

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-2059

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
SAMUEL ALLEN, RAYMOND HARDRICK
and MELVIN LEMMONS,

Petitioners-Appellees,

-against-

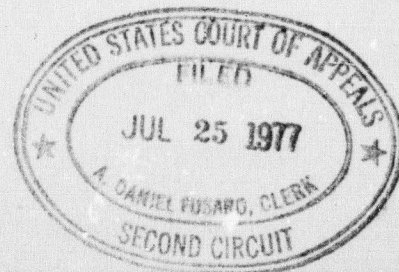
COUNTY COURT, ULSTER COUNTY NEW
YORK; WARDEN, WOODBURNE CORRECTIONAL
FACILITY, Woodburne, New York,

Respondents-Appellants.
-----X

APPENDIX

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PAGINATION AS IN ORIGINAL COPY

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DATE NR.

NO. 2.

PROCEEDINGS

1. Filed Petition for Writ of Habeas Corpus.
- 10-20-76 2. Filed Appellant's Appendix (Court of Appeals , State of N.Y.)
- 11-4-76 3. Filed OFSC for WHC ret. 11-18-76 at 2:15 PM Owen J.,
- 1-2-77 4. Filed memo of law in opposition to petition for writ of habeas corpus, with
Kerox copies of transcript for N.Y.S. Court of Appeals
- 1-7-77 5. Filed memo of law to petitioners.
- 1-17-77 6. Filed respondents supplementary memo of law.
- 4-21-77 7. Filed Memorandum & Order The petition for writ of habeas corpus is
granted. The writ shall issue. Submit order...So Ordered...OWEN.J. m/n
- 4-28-77 8. Filed order that the application for a writ of habeas corpus by
petitioners is granted that their judgments of conviction and sentences
in People of the State of N.Y. v. Lemmons et al. 25-73 be set aside,
that indictments No. 25-73 be dismissed, and that any form of custody
to which petitioners are being subjected or are to be subjected pur-
suant to their convictions and sentences in this case be terminated
forthwith.....So Ordered...OWEN.J. m/n
- 5-21-77 9. Filed Respondents Notice of Appeal.
- 6-3-77 10. Transmitted to Court that per [unclear] [unclear]
H. O. S. T.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
SAMUEL ALLEN, RAYMOND HARDRICK :
and MELVIN LEMMONS, :

76 Civ. 4794

Petitioners, :

MEMORANDUM AND ORDER

-against- :

COUNTY COURT, ULSTER COUNTY, :
NEW YORK, WARDEN, Woodbourne :
Correctional Facility, Woodbourne, :
New York. :

-----X
OWEN, District Judge

Petitioners Allen, Hardrick and Lemmons were convicted on two counts of felonious possession of a gun under N.Y.Penal L. § 265.05(2)⁽¹⁾ in the County Court of Ulster County. They seek a writ of habeas corpus releasing them from custody⁽²⁾ and setting aside their convictions. The convictions were affirmed on successive appeals, although over strong dissents.⁽³⁾

The three petitioners were driving in a car with

(1)

Now § 265.02(4)

(2)

Petitioner Allen is on parole; petitioners Hardrick and Lemmons are presently incarcerated on unrelated charges, not yet having begun to serve their sentences on this conviction.

(3)

These convictions were affirmed in 44 App. Div.2d 639, 370 N.Y.S.2d 243 (3d Dept. 1975) and 40 N.Y.2d 505, 387 N.Y.S.2d 97 (1976).

one "Jane Doe," a co-defendant below, who was also convicted of possession.⁽⁴⁾ Lemmons was driving, with Jane Doe sitting in the right front seat; Allen and Hardrick were in the back seat. When the car was pulled over for a speeding violation, one of the police officers approached the passenger side of the car. There, on the floor of the front seat between Jane Doe's feet and the right front door, he observed her handbag with the handle of a gun visible. Upon inspection he found a second gun in the handbag as well. Both were loaded. It is for possession of these guns that petitioners were convicted.

The State conceded on oral argument that the only basis for the conviction was the presumption as set forth below:⁽⁵⁾

New York Penal Law § 265.15(3)

The presence in an automobile . . . of any firearm . . . is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon . . . is found

Petitioners moved at the close of the People's case,

(4)

Doe was adjudicated a youthful offender.

(5)

See also People v. Lemmons, 370 N.Y.S.2d at 246 (Greenblott J., dissenting) and 387 N.Y.S.2d at 104 (Fuchsberg. J., dissenting).

to dismiss both gun-possession counts for insufficient evidence, claiming the presumption did not apply to them.⁽⁶⁾ The motion was denied and the court thereafter charged the jury as to the presumption without charging the exception.

Petitioners now seek a writ of habeas corpus under 28 U.S.C. § 2254 on the ground, inter alia, that the presumption of possession in § 265.15(3) as applied to them resulted in an unconstitutional denial of due process.⁽⁷⁾

(6)

Petitioners relied upon language in § 265.15(3), *supra*, providing that the presumption is applicable "except under the following circumstances: (a) if such weapon . . . is found upon the person of one of the occupants therein . . .

(7) There has been much discussion in the opinions in the New York Court of Appeals and in the briefs before me concerning the trial judge's failure to charge the jury on the exception to the presumption and petitioners' failure to object to the charge as given. I find that petitioners' trial strategy was in no way inconsistent with their present argument, and in view of the fact that they argued the inapplicability of the presumption to the state appellate courts, failure to object, I find, was not a "deliberate by-pass" of state procedure. Fay v. Noia, 372 U.S. 391, 439 (1963); Kibbe v. Henderson, 534 F.2d 493 (2d Cir.) cert. granted, 97 S.Ct. 55 (1976). However, I need not reach the charge issue since I find that petitioners' motion to dismiss after the People's case should have been granted.

v

The test for the constitutionality of a presumption has been stated as whether "the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." United States v. Leary, 395 U.S. 6, 36 (1969). There must "be a rational connection between the facts proved and the fact presumed," or a "reasonable relationship to the circumstances of life as we know them." Tot v. United States, 319 U.S. 463, 467-68 (1943). New York courts similarly define the test. See People v. McCaleb, 25 N.Y.2d 394, 400-01 (1969).

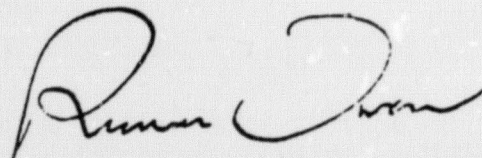
Thus, here, was it "more likely than not" that from the mere presence of two guns in a woman's handbag, "possession" by three others in the car could be reasonably inferred? I conclude that in the circumstances of life that inference does not reasonably follow.

In addition, I note, as mentioned earlier, that in the very statute under consideration the presumption does not apply when the weapon is found "upon the person" of one of the occupants. In People v. Pugash, 15 N.Y. 2d 65 (1964), cert. denied, 380 U.S. 936, appeal dismissed, 382 U.S. 20 (1965), the New York Court of Appeals held that a firearm in a briefcase carried by a person was "concealed upon his person." A fortiori, a woman's handbag in a car within her reach is her equivalent of a man's various pockets, and normally entitled to privacy. Its

contents are, therefore, necessarily "upon her person."

Having concluded that the presumption is, as a matter of law, inapplicable in this case, and there being no other evidence to support petitioners' conviction, the petition for writ of habeas corpus is granted. The writ shall issue. Submit order.

April 19, 1977.


United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAMUEL ALLEN, RAYMOND HARDRICK and
MELVIN LEMMONS,

Petitioners,

76 Civ. 4794

-against-

ORDER

COUNTY COURT, ULSTER COUNTY, NEW YORK,
WARDEN, Woodbourne Correctional Facility,
Woodbourne, New York

WHEREAS, this Court, on April 19, 1977, order that the application for a writ of habeas corpus of petitioners Allen, Hardrick and Lemmons be granted, it is hereby

ORDERED, that the application for a writ of habeas corpus by petitioners Allen, Hardrick and Lemmons is granted, that their judgments of conviction and sentences in People of the State of New York v. Lemmons et al, 25-73 be set aside, that indictment No. 25-73 be dismissed, and that any form of custody to which petitioners are being subjected or are to be subjected pursuant to their convictions and sentences in this case be terminated forthwith.

Dated: New York, New York

UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF NEW YORK

A7

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAMUEL ALLEN, RAYMOND HARDRICK
and MELVIN LEMMONS,

Petitioners,

-against-

COUNTY COURT, ULSTER COUNTY,
NEW YORK, WARDEN, Woodbourne
Correctional Facility, Woodbourne,
New York,

PETITION FOR A WRIT
OF HABEAS CORPUS

RECEIVED
NOV 3 - 1978
DEPARTMENT OF LAW
NEW YORK CITY OFFICE

JUDGE OWEN

76 CV 1794

The relator, J. JEFFREY WEISENFELD, on behalf of petitioners, SAMUEL ALLEN, RAYMOND HARDRICK and MELVIN LEMMONS, respectfully represents:

1. Petitioners, SAMUEL ALLEN, RAYMOND HARDRICK and MELVIN LEMMONS, in County Court, County of Ulster, were each convicted of two counts of possession of a gun as a felony (within the Southern District of New York).

On June 28, 1974, Hardrick and Allen were sentenced to seven years imprisonment on each count, said sentences to run concurrently (Mino, J.) Allen has been paroled, after serving more than two years of his sentence.

On August 22, 1974, petitioner Lemmons was sentenced to seven years imprisonment on each count; sentences to run concurrently (Mino, J.) These sentences are to begin upon the completion of a ten year sentence imposed upon Lemmons in an unrelated Federal case in the District of Michigan.

Hardrick is presently incarcerated upon an unrelated Federal case. His sentence on this conviction is to begin upon completion of his Federal sentence.

Timely notice of appeal were filed on behalf of all the petitioners and on July 2, 1975, the Appellate Division Third Department affirmed the judgment of conviction without a written opinion. Two justices concurring in part and dissenting in part in a written

opinion (opinion annexed as Exhibit "A").

On August 6, 1975, Hon. Louis M. Greenblott, granted leave to appeal to the Court of Appeals and a timely notice of appeal was filed August 19, 1975.

In an opinion dated July 15, 1976, the Court of Appeals (Wachtler and Fuchsberg, J., dissenting) affirmed the order of conviction (opinion annexed as Exhibit "B").

2. Petitioners petition for a writ of habeas corpus on the ground that the statutory presumption of possession (§265.15(3) P.L.) is unconstitutional on its face and as applied to them.

3. On May 8th to May 14th, 1974, a jury trial was held before Hon. Raymond J. Mino. All the petitioners were convicted of two counts of possession of a weapon. The only pertinent facts are those which relate to those weapons.

All petitioners and Jane Doe, a co-defendant below, were driving in an automobile on the New York State Thruway, references are to the appendix in the State Court of Appeals annexed hereto as Exhibit "C") (A172). The automobile was stopped for a speeding violation (A169). The driver of the automobile, Lemmons, was arrested on the basis of an alleged Michigan warrant (A190).

After the arrest of Lemmons, Officer Askew returned to Lemmons vehicle (A192). Lemmons had been driving. Doe was in the front passenger's seat, and Allen and Hardrick were in the rear (A192). As he approached the car, Askew walked around the front of the vehicle to the passenger's side (A192). He testified that he saw a pocketbook with a portion of a gun showing, lying on the floor of the front seat, between Doe and the door (A192, 213, 204-205). This pocketbook was seized and it was discovered to contain two guns. The pocketbook contained documents relating to Doe and when asked if the pocketbook were hers, she admitted that it was (A205). The guns formed the basis of the conviction of petitioners.

After the People's case, defense counsel moved to dismiss the charges; specifically, it was pointed out that the weapons in question were found "upon the person" of Doe and for this reason, the statutory presumption under Section 265.15 did not apply. The motion was denied.

At the end of the entire case, the Court charged the jury as follows:

Our Penal Law also provides that the presence in an automobile of any machine gun or of any handgun or firearm which is loaded is presumptive evidence of their unlawful possession.

In other words, these presumptions or this latter presumption upon proof of the presence of the machine gun and the hand weapons, you may infer and draw a conclusion that such prohibited weapon was possessed by each of the defendants who occupied the automobile at the time when such instruments were found. The presumption or presumptions is effective only so long as there is no substantial evidence contradicting the conclusion flowing from the presumption, and the presumption, and the presumption is said to disappear when such contradictory evidence is adduced.

To prove their accusations beyond a reasonable doubt, the People here introduced evidence - and I am going to very briefly outline it - to establish the stopping of the automobile on the Thruway; that the automobile was occupied by the four defendants at the time the automobile was stopped; that two concealable weapons or handguns were found in the purse of one of the defendants which was either on the front seat or on the floor in the front of the automobile; and that thereafter a search of the trunk disclosed a machine gun and the heroin. (A362-363).

Petitioners, Allen, Hardrick and Lemmons moved to have the verdict set aside on the ground of insufficient evidence. This motion was denied.

4. The only evidence in this case pertaining to the charge for which Allen, Hardrick and Lemmons were convicted was that two guns were found in Doe's pocketbook. This pocketbook was found on the floor of the car near where Doe had been sitting.

Under these circumstances, the conviction of Allen, Hardrick and Lemmons for possession of these weapons cannot stand.

First, under the very terms of the statute, Section 265.15(3) P.L., no presumption can arise where the weapon is found on the person of a particular party. Here, the possession of the guns can only be attributed by Doe. These weapons were found in her pocketbook. A woman's pocketbook is clearly on her person and numerous cases have, in analogous circumstances, so held. For example, in People v. Pugach, 15 N.Y. 2d 65 (1964), cert. denied 380 U.S. 936, the Court of Appeals upheld the "frisk" of defendant's briefcase even after it had been taken from defendant and was in possession of a police officer. The Court stated:

The fact that the loaded gun was found concealed in the brief case, rather than in a pocket of defendant's clothing, affords no grounds for saying that this "frisk" was in reality a constitutionally protected search. The loaded firearm concealed in the brief case carried in the hands of the defendant was in the language of the statute "concealed upon his person" (Penal Law Section 1897). (The predecision to §265.15 P.L.) Id. at 69.

People v. Moore, 32 N.Y. 2d 67, 71 (1973) ("frisk" of defendant's handbag permitted). See People v. Bowles, 29 A.D. 2d 996 (3d Dept., 1968) ("frisk" of defendant's trousers which were on the floor of defendant's room).

It is clear that contraband contained in the handbag of one of the passengers of an automobile is contraband "concealed upon the person" of that occupant and that occupant alone. The mere fact that at the time of the discovery and seizure Doe was not physically holding her bag is not significant.

In Pugach, the discovery was made after the police had custody of the briefcase. In Moore, the same is so of the handbag, and in Bowles, the same is true of the trousers. People v. Davis, 52 Misc. 2d 184, 185 (Sup.Ct. Queens Co., 1966); People v. Desthers, 343 N.Y.

All

2d 887 (Crim.Ct., City of N.Y., N.Y.Co.1973); People v. Garcia, 41 A.D. 2d 560 (2d Dept., 1973); People v. Rivera, N.Y.L.J. 9/18/74 p.17 col.6 (Special Narcotics Courts, N.Y.C., 1974).

Doe was the only woman in the automobile, the pocketbook was seen between her leg and the door immediately prior to the seizure. When questioned Doe admitted ownership. Moreover, there were documents in the purse which indicated Doe's ownership. Under these circumstances, the presumption set out in Section 265.15 cannot arise as to Allen, Hardrick and Lemmons.

Second, if the presumption is applicable here, then it is unconstitutional both on its face and as applied.

In Leary v. United States, 395 U.S. 6 (1969), the Supreme Court held that a presumption must be regarded as "irrational" or "arbitrary" and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proven fact upon which it is made to depend. Id. at 36.

The New York test has been held to basically conform to that set out in Leary; though the actual language is somewhat different (i.e., "based on life and life's experiences", there is a "fair", "natural" and "rational" connection between the fact proved and the fact to be presumed or inferred). People v. McCaleb, N.Y. 2d 394, 400-401 (1969); People v. Terra, 303 N.Y. 332, 335 (1961) app. dism'd 342 U.S. 938; People v. Reisman, 29 N.Y. 2d 278, 286 (1971).

Under the circumstances of this case, there is absolutely no basis upon which to find that possession by petitioners of these guns is more likely than not to flow from the finding of these guns within the automobile. An attack upon the constitutionality of the presumption was made in Stubbs v. Smith, ___ F.2d ___ (2d Cir.1976) slip.op. p.2913 (4/2/76). The Court there found it unnecessary to determine the issue of the constitutionality of the presumption.

The Court found that since the petitioner was convicted of an assault with the gun, there was a basis for the conviction of possession of the gun independent of the presumption. Therefore, even if the presumption was unconstitutional, the error was harmless.

Such is not the case here, where the conviction was based entirely upon the use of the presumption. See People v. DiLandri, 250 App.Div. 52 (1st Dept., 1937). Thus, the validity of the presumption is clearly at issue. The majority opinion in the New York Court of Appeals goes into the history and necessity of the statutory presumption, but paid no attention at all to articulating the rational connection between the proven and presumed facts. Ease of conviction is no substitute for the required rational connection.

Further, in Mullaney v. Wilbur, 421 U.S. 684 (1975) the Supreme Court indicated that in some instances, at least, affirmative defenses which shift the burden of proof are a violation of due process. Evidently, the Court understood full well that there is a significant interplay between affirmative defenses and presumptions; that an affirmative defense can be phrased as a presumption and vice versa (e.g. It shall be a crime to be in a car with a gun; but it is an affirmative defense that the gun was on the person of one of the occupants. Or, it is illegal to possess a gun. All persons found in a car with a gun are presumed to possess it unless it is found upon the person of one of the occupants). With this interplay in mind, the Supreme Court reiterated the requirement of a rational connection between proven and presumed facts. *Id.* at 702 n.31. However, the Court did not comment on a circumstance such as here, where the trier of fact is required to find possession and possession is the crime charged. Here, the operation of the presumption is no mere procedural device shifting only the burden of production. Here, there is a virtual shift in the burden of persuasion. See, Byrd v. Hopper, ___ F.Supp. ___ (U.S.D.C., N.Ca. 1975); 18 CrL. 2143.

At the very least, Mullaney requires a hard look at statutory

presumptions to make sure they are rational. This statutory presumption is invalid on its face for there is no rational connection between a gun being in a car and possession by each occupant. This presumption now permits a passenger to be convicted of possession of a gun found in a locked trunk or glove compartment of the car. Such a presumption cannot stand.

Even if the presumption were constitutional on its face, it is clearly unconstitutional as applied. These guns were found in Doe's handbag, which was between her leg and the door of the front passenger's seat. The pocketbook had Doe's papers in it and Doe admitted it was her bag. Lemmons was out of the car at the time of the seizure and Hardrick and Allen were in the rear of the car. The New York Court of Appeals, in its opinion, states absolutely no reasons why there is a sufficient rational connection between the finding of the gun and the possession by petitioners. This absence in the majority opinion results from there being no rational connection between the guns in the pocketbook and possession by all the occupants.

5. The charge of the trial court denied petitioners due process in that it failed to charge a necessary element of the crime; namely, that the conviction could only be had if the jury found that the guns in question were not upon Doe's person. So too, the charge was improper in that it made no mention of scienter, but relied upon the presumption. People v. Robledo, N.Y.L.J. 9/27/76, p.21 c.4 (Sup.Ct.N.Y.Co.). The failure to object to the charge or raise the issue in the State Court does not preclude relief in the Federal Courts, since there was no deliberate by-pass, there being no tactical reason for the failure to object. Kibbie v. Henderson, ___F.2d___ (2d Cir., 1976) slip.op. 75-2128 p. 3081 (4/8/76) cert. granted ___U.S.___ (1976).

6. The petitioners were convicted on less than proof of guilt beyond a reasonable doubt. Even if the presumption set out in §265.15 is constitutional and applicable here, the conviction was still had upon less than a finding of guilt beyond a reasonable doubt. Here, the necessary element of scienter or mens rea is not supplied by the presumption. The presumption merely supplies constructive possession and not mens rea and therefore, petitioners here were improperly and unconstitutionally convicted. People v. Robledo, N.Y.L.J. 9/27/76 p.21 c.4 (Sup.Ct., N.Y.Co.); In re Winship, 397 U.S. 358 (1970); cf. Mullaney v. Wilbur, 421 U.S. 634 (1975).

In the trial court, petitioners' counsel moved to dismiss the charges and to set aside the verdict on the grounds that the evidence of guilt was insufficient. The argument in the Appellate Division and the Court of Appeals was phrased in the same language. Thus, the issue was clearly preserved for the Federal Courts. In any event, there was no deliberate by-pass of the issue. Kibbie v. Henderson, *supra*.

7. Petitioners have exhausted their state remedies.

WHEREFORE, petitioners pray that the Writ be granted and an order be entered reversing the judgments of conviction, discharging them from custody and for such other and further relief which may to the Court seem just and proper.

Dated: New York, N. Y.
October 26, 1976

J. Jeffrey Weisenfeld
J. JEFFREY WEISENFELD

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

J. JEFFREY WEISENFELD, being duly sworn, deposes and says that deponent is the relator in the within action; that deponent has read the foregoing Petition and knows the contents thereof; that the same are true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes them to be true.

Sworn to before me this
26th day of October, 1976

J. Jeffrey Weisenfeld

J. JEFFREY WEISENFELD

Jerome E. Goldman

JEROME E. GOLDMAN
Notary Public, State of New York
No. 30-6571240, Nassau County
Certificate filed in New York County
Commission Expires March 30, 1977

RA 36

Appellate Division Decision.

SUPREME COURT,

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

July 2, 1975

22946

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

MELVIN LEMMONS, *et al.*,

Appellants.

Judgments, County Court, Ulster County (Mino, J.), rendered on June 28, 1974 and August 22, 1974, affirmed. No opinion.

Herlihy, P. J., Larkin and Reynolds, JJ., concur; Greenblott and Sweeney, JJ., concur in part and dissent in part in a memorandum by Greenblott, J.

GREENBLOTT, J. (concurring in part and dissenting in part).

These are appeals from judgments of the County Court of Ulster County, rendered June 28, 1974 in the cases of defendants Hardrick and Allen, and August 22, 1974 in the cases of defendants Lemmons and Doe* upon a verdict convicting each of the defendants of two counts of the crime of possession of a loaded handgun in violation of subdivision 2 of section 265.05 of the Penal Law.

On March 28, 1973, the defendants Lemmons, Hardrick, Allen and Doe were driving in an automobile on the New

*Fictitious name.

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RA 37

Appellate Division Decision

York State Thruway that was stopped for a speeding violation. In response to Trooper Emsing's request the driver, defendant Lemmons, produced a valid New York temporary registration certificate in his brother's name and a valid Michigan driver's license. As Trooper Emsing was making out the traffic citation at the patrol car, his partner, Trooper Askew, radioed for a computer check of the documents. The reply message was that Lemmons was wanted in Michigan on a fugitive warrant for a weapons violation. As a result of receiving that information, Lemmons was placed under arrest, handcuffed and put in the back seat of the patrol car. Trooper Askew then returned to the car Lemmons had been driving, and according to his testimony as found credible by the County Court in the course of a suppression hearing, he noticed through a window on the passenger side a handgun sticking out of defendant Doe's pocketbook. (Doe was the only female in the vehicle.) Doe, Hardrick and Allen were then arrested and a subsequent search revealed a second handgun in the pocketbook, and a machine gun and a quantity of heroin in the trunk.

Defendants' first contention on this appeal is that the motion to suppress the two handguns should have been granted. Since the defendants were acquitted of charges stemming from discovery of the machine gun and the heroin, the validity of the search of the trunk is not before us. Subsequent to the events above described, it was determined that the fugitive warrant against Lemmons had been withdrawn prior to March 28, 1973.

We do not agree with the trial court that the arrest of defendant Lemmons was valid. While the arresting officer did not act improperly in acting on the basis of information communicated to him by other police sources, "the presumption of probable cause that originally cloaked

A18

Appellate Division Decision

that action disappears from the case" on a motion to suppress. "[T]he People must demonstrate that the . . . sending agency itself possessed the requisite probable cause to act." (*People v. Lypka*, 36 N. Y. 2d 210.) This result is compelled by the decision in *Whiteley v. Warden, Wyoming State Penitentiary* (401 U. S. 560). There, an arrest was based on information transmitted to the arresting officer by another police agency although the sending agency lacked probable cause. The arrest and subsequent search were invalidated and the case before us is indistinguishable. It was improper for the trial court to rely on *People v. LaBelle* (37 A. D. 2d 135), for in that case the arresting officer had probable cause to effect an arrest independent of an invalid warrant.

We feel, however, that the seizure of the handguns was proper under the "plain view" doctrine. As noted above, it has been determined as a matter of fact that the guns were observed from outside the car through a window on the passenger side. Thus, it is not urged that this observation was the fruit of an illegal intrusion. The defendants contend, however, that because Trooper Askew stated that he returned to the passenger side of the car to "continue the arrest", the trooper was in a position to have the view only as a result of the invalid arrest of Lemmons, wherefore the seizure should not be sustained. We disagree, for in our view the trooper's motives for walking to the passenger side are not in the circumstances here presented pertinent to a determination of whether there was a violation of the defendants' rights. The trooper was standing on a public highway, and the vehicle had been lawfully stopped. The election by Trooper Askew to stand on the passenger side of the vehicle, so long as he refrained from any illegal intrusion, is simply without constitutional significance in the absence of any constitutional or other legal restriction as to which side of a car

A19

Appellate Division Decision

a police officer must stay on when a vehicle has been lawfully stopped for a traffic violation. Therefore, the seizure of handguns open to the trooper's plain view was not improper.

The second issue we are faced with on this appeal, raised by defendants Lemmons, Hardrick and Allen, is whether their convictions for possession of these handguns can be sustained and it is on this issue that we disagree with the majority. Subdivision 3 of section 265.15 of the Penal Law reads in pertinent part as follows: "The presence in an automobile * * * of any firearm * * * is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon * * * is found, except * * * if such weapon * * * is found upon the person of one of the occupants therein * * *." Here, the undisputed evidence showed that there was only one pocketbook in the car, it was situated on the floor in the front of the car between the door and defendant Doe's legs, and, most significantly, its ownership by defendant Doe was established. It is common knowledge that the owner of a pocketbook often carries personal belongings therein. Since here, ownership of the pocketbook was established and the owner was present, the exception to the presumption is clearly applicable. To contend in such circumstances that the pocketbook and its contents were not "upon the person" of defendant Doe merely because at the moment of seizure she was not in actual physical contact strains common sense and subverts the purpose of the statute. (Cf. *People v. Pugach*, 15 N. Y. 2d 65.) Since a pocketbook is an item as to which the owner normally has expectations of privacy, there would be no proper basis for assuming that others in the presence of such a pocketbook would have reason to know its contents. In such a situation, the statute should not be construed to require persons

RA 40

Appellate Division Decision

traveling with the owner of a pocketbook to explain away the presence of contraband therein in the absence of any additional proof. Since no other evidence was presented on the issue of possession of the handguns, the convictions of defendants Lemmons, Hardrick and Allen should be reversed and the indictments against them dismissed.

We, therefore, dissent and vote to reverse the judgments of conviction against defendants Lemmons, Hardrick and Allen, and to dismiss the indictments against them. We concur with the majority insofar as the judgment of conviction against the defendant Doe is concerned, for the reasons stated herein.

A21

State of New York Court of Appeals

3 No. 293
The People &c., Respondent,
vs.
Melvin Lemmons, &ors., Appellants.

OPINION

This opinion is uncorrected and subject to revision
before publication in the New York Reports.

(283)

J. Jeffrey Weisenfeld for appellants.
Francis J. Vogt, District Attorney (Michael
Kavanagh & Edward M.P. Greene of counsel) for
respondent.

JASEN, J.:

Defendants Melvin Lemmons, Raymond Hardrick, Samuel Allen and Jane Doe¹ were convicted, after a jury trial, of two counts of possession of a dangerous weapon, two loaded revolvers. The Appellate Division, with two justices dissenting in part, affirmed the judgments of conviction, without opinion. (49 AD2d 639.) On this appeal, all four defendants argue that their motion to suppress the weapons on constitutional grounds should have been granted. In addition, defendants Lemmons, Hardrick and Allen contest the legal sufficiency of the evidence supporting their convictions. There should be an affirmance.

On March 28, 1973, the defendants were riding in a late model passenger car on the New York State Thruway. Melvin Lemmons was at the wheel, with

¹ A fictitious name for a young woman subsequently adjudicated a youthful offender.

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Jane Doe beside him in the front seat and the other two defendants seated in the back. Shortly before 1:00 P.M., while the car was passing through Ulster County, it was detected speeding and a state trooper signalled the driver to pull the car over to the right side of the road. The patrol car stopped abreast of the Lemmons vehicle on the grassy center mall on the left side of the highway. Officer John Emsing walked over to the car, approached the driver, requested his operator's license, and advised him that the officer was going to issue him a ticket for speeding. Lemmons produced a Michigan driver's license and no vehicle registration at all.² Since the vehicle had New York license plates, the officers followed normal procedure by requesting, over the police radio, that the Department of Motor Vehicles check on the operator's license and the car registration. In addition, the officers had their dispatcher submit the information to the National Crime Information Center computer. Although the State department reported that the vehicle was "clean", the computer check revealed that Lemmons was "wanted by the police department in Detroit, Michigan on a weapons violation". Upon receiving this information, Officer Askew, the second state policeman in the patrol car, crossed the highway, placed Lemmons under arrest for being "a fugitive from justice", brought him over to the patrol car and placed him in the back seat. Officer Askew then returned to the Lemmons vehicle in order to ascertain the identity of its three remaining occupants. "I had three other unknown people. Obviously, I have to get their names". He walked around the vehicle to the passenger's side and looked into the window. He spotted a woman's handbag on

² At the suppression hearing, Officer Emsing testified that defendant Lemmons displayed a long since expired temporary registration. On the other hand, Officer Askew stated that no registration at all had been produced. The suppression court credited Officer Askew's version and this finding, as well as the other findings of fact made by the suppression court, were affirmed by the Appellate Division. Thus, our review is restricted to the legality of the weapons' seizure and to the sufficiency of the evidence and we may not consider defendants' arguments, addressed to alleged factual contradictions (See, e.g., People v Maney, 37 NY2d 229, 233.)

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the floor of the car between the door and the front seat. A portion of a .45 caliber automatic pistol was protruding from the open handbag. The officer then placed the three passengers under arrest. A subsequent search of the handbag established that there were two loaded automatic pistols inside, the criminal possession of which all four defendants have been held accountable.

All defendants contend that the arrest of Melvin Lemmons was invalid and, since the "search" of the car was incident to his arrest, the evidence of handgun possession should have been suppressed. Reliance is placed on the fact that the Michigan warrant upon which Lemmons' arrest was predicated had been dismissed a few days prior to this incident. In our view, the validity of the seizure of the two weapons does not turn upon the legality of Lemmons' arrest under the dismissed Michigan warrant.³ We sustain the seizure upon the ground that the weapons came into the plain view of the state policeman as he was conducting a legitimate police inquiry.

The standard by which the constitutionality of seizure and search is measured is whether the actions of the police were reasonable in light of all the circumstances. (Cady v Dombrowski, 413 US 433, 448, People v Kreichman, 7 NY2d 693, 697, see People v Moore, 32 NY2d 67, 69, cert den 414 US 1011) Here, the seizure of the handguns was not the product of a search, for the only search ever conducted by the state police officers was a frisk of Lemmons' person for weapons. The handguns, rather, came into the plain view of an officer conducting an inquiry that was reasonable under the circumstances. Lemmons, the driver of the car, had been apprehended speeding, did not possess valid vehicle registration and was apparently wanted by the authorities of another state. Confronted with these facts, the officers were entitled, if not obligated, to ascertain the identity of his three travelling companions.

In light of our resolution of the issue, we do not decide whether Lemmons' arrest was, in fact, valid. (See People v Lypka, 36 NY2d 210, 214; People v Apene, ____ NY2d ____ (decided June 15, 1976), slip op at p 14)

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(See People v DeBour, ____ NY2d ____ [decided June 15 1976; slip op at pp 8-9.) This, and no more, is what the officer sought to do. In performing his duty, the officer observed a weapon in a handbag within open view. The seizure of the bag and its contents and the subsequent arrest of the three passengers were legitimate and constitutional police responses to the situation then confronted. (See People v Singletary, 35 NY2d 528, Ker v California, 374 US 23, 42-43; cf., People v Brosnan, 32 NY2d 254, 260)

Turning to the second issue on this appeal, the three male defendants contend that there is insufficient evidence to establish that they were in possession of the handbag containing the weapons. The fourth defendant, Jane Doe, is precluded from raising this argument because of her voluntary admission that the handbag was hers. To support the convictions of the three men, the People rely on Penal Law section 265.15 (subd 3) which provides, insofar as it is relevant here, that the presence of a firearm in a private automobile, other than a stolen vehicle, "is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon, instrument or appliance is found, except * * * if such weapon, instrument or appliance is found upon the person of one of the occupants therein * * *". Defendants argue that the handbag of Jane Doe was a part of her person and, thus, the statutory presumption is inapplicable.

To resolve the issue, we first look to the history underlying the statute. Since the automobile is itself of relatively recent origin, it was not until the second and third decades of this century, when popular use and ownership of motorized vehicles first became widespread, that automobiles came into vogue as an instrument for the furtherance of criminal purposes. Under traditional rules, developed in a motorless age, criminal possession of a weapon was not established unless the weapon was "within the immediate control and reach of the accused and where it is available for unlawful use if he so desires". (E g., People v Persce, 204 NY 397, 402.) Difficulties arose when

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a weapon was found secreted under the seat, in the glove compartment or in the trunk of an occupied automobile. Traditional analysis precluded a finding that any of several occupants of the automobile was sufficiently close to the weapon as to be in actual possession of it. For example, in one 1930 case the police intercepted an automobile and found a revolver under the driver's seat. The court, in applying the relevant standards, was compelled to release all defendants for failure to sufficiently establish possession (People ex rel. De Feo v Warden, 136 Misc 836.) The court remarked, however, that the case and other similar situations "establishes the urgent need for legislation making the presence of a forbidden firearm in an automobile or other vehicle presumptive evidence of its possession by all the occupants thereof. Such an amendment would require the occupants of an automobile to explain the presence of the firearm and enable the court to fix the criminal responsibility for its possession." (136 Misc 836.) In 1936, the Legislature took heed of this suggestion and enacted section 1898-a of the former Penal Law providing that all persons in an automobile at the time a weapon is found in the vehicle are presumed to be in illegal possession of the weapon. (L 1936, ch 390.) Although the statute did contain a number of exceptions, the statute did not except one situation where the weapon was found on the person of one of the vehicle's occupants. This exception made its appearance much later, in 1963, when the Legislature redrafted a number of contraband-related presumptions and placed them in a single section of the old Penal Law, section 1899. (L 1963, ch 106 § 4.) However, it should be noted that at least one court had read such an exception into the statute prior to its 1963 amendment. (See People v Logan, 94 NYS2d 681, 684.) The "upon the person" exception was carried into the present provision of the 1967 Penal Law.

The statutory presumption establishes a prima facie case against the defendant which presumption he may, if he chooses, rebut by offering evidence. Generally, the presumption will remain in the case for the jury to weigh even

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if contrary proof is offered but may be nullified if the contrary evidence is strong enough to make the presumption incredible. So too, if no contrary proof is offered, the presumption is not conclusive, but may be rejected by the jury (Cf., People v McCaleb, 25 NY2d 394, see also, People v Leyra, 38 NY2d 160.)

Whether the weapons were found on the person of one of the vehicle's occupants is primarily a question of fact. Here, there was testimony that the handbag was situated on the floor of the car in the space between the front seat and the car door. The argument that the pocketbook was a part of Jane Doe's person is not an unattractive one, given the fact that women and men in our society often use handbags and purses to carry and store personal items of many kinds and are generally held directly by the hand or arm or are placed within easy reach. However, the placement of a weapon in a handbag does not necessarily indicate that the owner of a handbag is in sole and exclusive possession of the weapon. Whether the owner of the handbag is the sole possessor of the weapon depends upon the access to the bag that others may have and whether the others have knowledge of its contents. Similar reasoning might well be applied to briefcases, shopping bags with groceries, cartons, suitcases or the myriad of other things that people frequently carry or transport. To hold that merely because the weapons were found in a briefcase, handbag, shopping bag or carton the presumption is nullified would defeat the legislative intent and render the statute nugatory. Astute illegal possessors of weapons then would only need to carry weapons in any kind of personalized containers to successfully evade joint responsibility. There would be added difficulty, not present in this case, of ascribing ownership of the container to one of the passengers, a matter that might be resistant to proof where the container itself reveals no information to identify its owner or where the owner of the container is not present in the vehicle at the time of apprehension. Surely this kind of rationale would return the law to the early days

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of this century when law enforcement was easily frustrated by an automobile shell game reminiscent more of vaudeville than of the courts. To be sure there may be circumstances where the evidence is clear-cut and leads to the sole conclusion that the weapon was found upon the person. For example, the exception would have clear application where the weapon is secreted under one person's shirt or under other items of clothing or in a pocket. (See People v Garcia, 41 AD2d 560; People v Davis, 52 Misc 2d 184 [J. Irwin Shapiro, J.]) Absent this kind of clear indication that the weapon was actually upon the person of one occupant, the question of the presumption's applicability is properly left to the trier of fact under an appropriate charge. Only the trier of fact, after hearing all the testimony and assessing the credibility of witnesses, can determine the factual issues of access and the degree to which possession is personalized. As in this case, the precise location of the container may be a critical factual issue. Although some may draw different inferences from the nature of the container and its placement, those inferences based as they are on contested facts, are generally to be drawn by juries and not by appellate judges.

It should be noted that defendants did seek to have the case dismissed, after the close of the People's case, on the ground that the presumption did not apply. The trial court denied the motion, apparently accepting the prosecutor's argument that the applicability of the presumption was a question of fact for the jury. However, the trial court never charged the jury with respect to the "on the person" exception. Nevertheless, the defense did not except to the absence of this language in the court's charge. As a result, what we view as a jury question was never presented to the jury and for the reasons stated we cannot conclude in this case that as a matter of law the presumption was inapplicable.

The order of the Appellate Division should be affirmed.

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People v Lemmons, Hardrick, Allen
and Doe

Case #283

WACHTLER, J. (concurring in part and dissenting in part):

I concur with the majority in concluding that defendant Lemmons' motion to suppress the two handguns should have been denied on the ground that the trial court found that these weapons were in "plain view". However I cannot agree that the convictions of Lemmons, Hardrick and Allen, for possession of the weapons found in defendant Doe's handbag should be affirmed.

Initially, I would note that the applicability of the presumption was put squarely in issue by the defendants. At the close of the People's case defendants, Lemmons, Hardrick and Allen, moved to dismiss the indictments on the ground that the statutory presumption of possession was negated by the uncontradicted proof that the weapons were at all times on the person of defendant Doe. Defendants strenuously contended that the handbag was her exclusive personal property and she alone exercised dominion and control over it. The record reveals that the court and the parties engaged in a lengthy colloquy on this specific point. In light of this pointed, thorough challenge to the operation of the presumption I believe that the issue was properly preserved and that the failure to object to the charge to the jury had no effect whatsoever with respect to preservation.

In my view the application of the presumption (PL 265.15 subd 3) arising from presence in an automobile in which a firearm is found was erroneous. The statute provides that the presence of a firearm in an automobile is presumptive evidence of its possession by all persons occupying the automobile, "except * * * if [it] is found upon the person of one of the occupants." I would conclude that, as a matter of law, the handguns in this instance were found "upon the person" of Jane Doe within the contemplation of the statute.

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In order to be convicted of the crime of possession of a firearm the People must establish beyond a reasonable doubt that the defendant had physical or constructive possession of a firearm (PL § 265.05, subd 1, 10.00 subd 8). In instances where several individuals are involved, none of whom has clear-cut dominion over the contraband, the task of the People is particularly difficult. Nowhere is this more difficult than where the individuals are situated in a motor vehicle (People ex rel Defer v Warden, 136 Misc 836). In response to this problem the Legislature in 1936 enacted a presumption of possession applicable to all persons present in an automobile at the time a weapon is found in the vehicle (L 1936 ch 390). The purpose of this presumption was articulated in People v Logan (94 NYS2d 681, 683-4):

"As with other presumptions, however, the presumption here being considered is a rule of necessity. It is to be invoked only if, under the circumstances involved, there is an absence of satisfactory evidence of the ultimate fact to be established to wit: To which of the occupants is possession attributable. Obviously, therefore, if the undisputed facts of any given situation establish that the gun is actually possessed by any particular individual or individuals occupying the automobile, there is then no burden under section 1898-a imposed upon the remaining occupants of such car to go forward with proof tending to refute the presumption which would otherwise attach by virtue of occupancy. The positive evidence of actual possession in such case would wholly dissipate the necessity for the invocation of the statutory presumption."

This provision was carried forward when the penal code was revised (L 1965, ch 1030) and was amended to provide an exception for weapons "found upon the person of one of the occupants" (PL 265.15 subd 3 subsection [a]). Constitutional challenges claiming that this presumption amounts to a denial of due process have been rejected (People v Terra, 303 NY 332; People v Russo, 278 App Div 98 aff'd 303 NY 673). In general, presumptions of this type are constitutional provided "based on life and life's experiences, a rational connection between the fact proved and the ultimate fact presumed may be said to exist" (People v Terra, *supra*, 303 NY at 335; Tot v US, 319 US 463, Leary v US, 395 US 6, People v McCaleb, 25 NY2d 394, People v Leyva, 38 NY2d 160; see generally McCormick, Evidence § 313). Certainly it is rational to infer from a person's presence in an automobile that he has actual or constructive possession over a weapon found

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in that vehicle. However, this statement is not true when the proof at trial establishes that the weapon is in the exclusive possession of one of the occupants. So, where a weapon is discovered in a passenger's vest pocket there will flow no rational belief that the driver is in possession of that weapon.

The same analysis applies where the weapon is found in a place which is but an extension of a particular individual. Here the weapon was found in a woman's handbag which was located within her natural and easy reach and defendant Doe, who was the only woman in the vehicle, expressly admitted that it was her possession. An inference that all the occupants possessed these weapons hardly follows, naturally and rationally, from these circumstances. Common experience teaches that a woman's pocketbook is but an extension of her pockets; intended to hold items which she cannot or prefers not to keep in her clothing. As such, a woman's handbag generally contains highly personalized items exclusively controlled by the owner and is markedly different from other receptacles, like shopping bags or cartons, which in common experience do not communicate the same exclusivity as a woman's handbag. In addition, this situation is clearly analogous to those cases where a search of the defendant's attache case or similar item within his exclusive control is sustained as incident to a valid arrest (e g . People v Weintraub, 35 NY2d 351; People v Pugach, 15 NY2d 65)

Equally important is the accompanying fact that this pocketbook was positioned within the easy and natural reach of its owner; it was also literally only within her easy reach and not that of any of the other passengers. Thus it was on the floor, a not unnatural placement, and between her legs and the right-hand passenger door. It was not, for instance, between Jane Doe and one of the other occupants, either on the seat or on the floor. In this combination of critical circumstances, when there was but one woman's pocketbook and but one woman in the car, who readily acknowledged that the pocketbook was hers, I would find the statutory presumption inapplicable. Indeed, this conclusion is inescapable in light of the historical origin of this statute as formulated within due process requirements. Convictions for possession of weapons simply cannot stand solely on

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the strength of a presumption where the fact presumed i.e physical or constructive possession, does not flow rationally from the evidence presented.

Although the inapplicability of the presumption here mandates reversal, that does not end the matter. Wholly apart from the presumption the People may establish that these defendants did actually exercise dominion and control over the handguns. The presence of the weapons in the vehicle coupled with other evidence presently in this record might well furnish a basis for a jury to infer logically that these defendants constructively possessed the weapons found in her handbag. Accordingly, the orders should be modified by reversing and granting a new trial as to all defendants except Jane Doe and otherwise affirmed

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PEOPLE v. LEMMONS, HARDRICK,
ALLEN and MURRAY

No. 283

7/1/76

JONES, J. (concurring):

I agree that the order of the Appellate Division should be affirmed and the convictions of all four defendants sustained.

At the close of the People's case defense counsel moved for dismissal on the ground that the presumption of Penal Law, § 265.15(3) was not applicable because the case fell within the express exception of the statute, and that in its absence there was insufficient evidence to support a conviction. The trial court denied this motion. Although the point is not pressed on the appeal to us, in my view the denial was not erroneous; whether in consequence of the exception the presumption was not available was a question later to be left to jury determination. To this extent I agree with the views expressed in the majority opinion.

At the conclusion of the entire case, however, the trial judge charged the jury that "upon proof of the presence [in the automobile of] the hand weapons, you may infer and draw a conclusion that such prohibited weapons were possessed by each of the defendants who occupied the automobile at the time when the instruments were found". But no reference was made in the charge to the statutory provision that the presumption would not apply "if such weapon * * * is found upon the person of one of the occupants". No exception was taken to this charge and no request was made that the charge be accurately completed. Thus, the jury was never advised of the exception and the case was submitted to and resolved by it on the basis of a blanket presumption which had become the law of the case.

Accordingly, in the procedural posture in which these verdicts of guilty were returned there can only be an affirmance.

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FUCHSBERG, J. (concurring in part and dissenting in part):

For the reasons stated in Judge Wachtler's concurring opinion, my vote is also for modification. However, in view of the fact that, despite a full trial, there appears to have been no evidence of control of the guns developed other than that set forth in the several opinions on this appeal, the appropriate corrective action should be dismissal for legal insufficiency of trial evidence (CPL 470.40, subd. [1], 470.20, subd. [2]; cf. United States ex rel Stubbs v Mancusi, __F.2d__ [2d Cir; Oakes, J.])

* * * * *

Order affirmed. Opinion by Jasen, J. All concur, Jones, J., in result in a separate opinion; except Wachtler, J., who concurs in part and dissents in part and votes to modify and order a new trial as to all defendants except Jane Doe, in an opinion, and Fuchsberg, J., who concurs in part and dissents in part and votes to modify and dismiss the indictment as to all defendants except Jane Doe, in an opinion.

Decided July 15, 1976

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*To be argued by
Francis J. Vogt*

Court of Appeals

State of New York.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

MELVIN LEMMONS, RAYMOND HARDRICK,
SAMUEL ALLEN and MARCELLA MURPHY,
Defendants-Appellants.

RESPONDENT'S BRIEF AND APPENDIX.

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Court of Appeals

STATE OF NEW YORK.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

MELVIN LEMMONS, RAYMOND HARDRICK, SAMUEL ALLEN and
MARCELLA MURPHY,

Defendants-Appellants.

RESPONDENT'S BRIEF.

Defendants appeal, by permission of a justice of the Appellate Division of the Supreme Court in the Third Judicial Department, from an order of that court, entered July 14, 1975, which affirmed judgments of the County Court of Ulster County (Raymond J. Mino, J.), rendered June 28, 1974, against defendants Hardrick and Allen, and August 22, 1974, against defendants Lemmons and Murphy, upon a verdict, convicting each defendant of two counts of the crime of unlawful possession of a loaded handgun (PL 263.05[2]).

Statement of the Case.

On March 28, 1973, a State Police radar team stopped the car in which defendants were riding for exceeding the reduced speed limit in a work zone on the Thruway. When the driver, Lemmons, produced a New York temporary registration certificate and a Michigan driver's license, Trooper Askew radioed for a computer check of the documents. The reply message reported that Lemmons was wanted in Michigan on a fugitive warrant for

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a weapons violation. The trooper thereupon arrested Lemmons and placed him in the patrol car.

Upon his return to the other vehicle, Trooper Askew peered through its front window on the passenger side and observed part of a handgun protruding from a handbag resting in the front of the car. He opened the door and seized a loaded .45 automatic pistol from the handbag. Underneath that gun he found and seized a loaded .38 revolver. The trooper ordered the other three occupants of the car out of the vehicle and arrested them.

At the State Police barracks, when no key to the trunk of the impounded car became available, the police pried open the locked trunk. A loaded machine gun was found therein, along with a pound or more of a substance later analyzed as heroin. Held for grand jury action after a preliminary hearing, defendants were indicted for criminal possession of a dangerous drug in the first degree, unlawful possession of a machine gun and unlawful possession of a loaded handgun (two counts).

After a pretrial hearing, the trial court denied defendants' motion to suppress the seized contraband. In its decision, the court held that the arrest of Lemmons on the fugitive warrant was valid; that the seizure of the handguns, exposed to open view as they were, was proper and that the arrest of all occupants of the automobile for possession of the said guns was lawful; and that their joint involvement in such handgun charges furnished the police probable cause for the warrantless search of the car trunk.

At the trial, the prosecution relied upon the statutory presumption to establish defendants' constructive possession of the machine gun (PL 265.15(1)) and the two hand-

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guns (PL 265.15 [3]). The jury acquitted defendants of the first two counts of the indictment but found them guilty of both counts of unlawful possession of a loaded handgun.

The convictions were affirmed by the Appellate Division, in a decision not yet reported, with the minority concurring in the affirmance of the trial finding that the handguns were in open view to the trooper.

POINT I.

Since the findings of the trial court and the jury were affirmed by the Appellate Division and are supported by the record, this court has no power to pass on the factual issue of the trooper's credibility.

Furthermore, the handguns were properly seized under the "plain view" doctrine and no search was needed or undertaken.

Defendants still attack the veracity of the trooper and urge that his credibility be reviewed on this appeal, even though they concede that this court's jurisdiction is limited to questions of Law (N. Y. Const., Art. VI, §3; CPL 470.35).

Reiterating their charge that the trooper testified falsely to nullify constitutional objections, defendants argue that the factual question of the officer's credibility should now be reviewed as a question of law.

The argument ignores the trial court's finding that the testimony was credible and asperses the jury's finding that the trooper was worthy of belief. These findings were unanimously affirmed by the Appellate Division and

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are amply supported by the record. Hence, this court has no jurisdiction to review the factual question of credibility.

People v. Maney, 37 N. Y. 2d 229, 233;
People v. Oden, 36 N. Y. 2d 382, 386;
People v. Leonti, 18 N. Y. 2d 384, 390;
Cohen & Karger, Powers of the New York Court
of Appeals (rev. ed.), §198, page 742.

Another appropriate response to defendants' baseless charge is found in *People v. Berrios* (28 N. Y. 2d 331), where Judge Scilleppi, writing for the court, emphasized that "there is no valid proof that all members of law enforcement agencies . . . who testify are perjurers" and that "all policemen should not be singled out as suspect as a matter of law" (p. 338).

As they did at the trial and again on the intermediate appeal, defendants still contend that the arrest of Lemmons was invalid and could not sustain a lawful search of their automobile. This contention sinks defendants into a quagmire of their own making for it is grounded upon the fallacious assumption that a search disclosed the handguns. The record does not support such a posture. Rather, it establishes that the trooper observed the guns in the handbag and properly seized the same without any search at all.

In sum, the testimony—found credible by both lower courts—established that the policeman had made a chance observation of apparent contraband and had not commenced any search until after he had seized the guns from the front of Lemmons' car. In such a situation, there is no search in the constitutional sense.

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People v. Rowell, 27 N. Y. 2d 691;
People v. Rivera, 14 N. Y. 2d 441;
People v. Cunningham, 26 A. D. 2d 966.

Lemmons' arrest was valid because a police officer is entitled to act on the strength of a radio bulletin or teletype alert from his headquarters and to assume its reliability.

Whiteley v. Warden, 401 U. S. 560, 568;
People v. Lypka, 36 N. Y. 2d 210, 213;
People v. Horowitz, 21 N. Y. 2d 55, 60.

Defendants acknowledge this statement to be the basic rule. They also concede that, since the bulletin or alert furnishes probable cause for an arrest, a reasonable search is permissible as incidental thereto. But they rely upon the further holding in *Whiteley* and *Lypka* that the probable cause which justifies the receiving officer's action disappears on a motion to suppress and, to sustain and search, the prosecution must demonstrate that the sending agency had the requisite probable cause to act.

However, the cited cases make it very clear that this secondary holding applies only when an actual search is made. In the instant situation the handguns were seized without a search, being in the plain view of the trooper. Since there was no search, only a lawful seizure, the secondary holding of the cited cases cannot here apply.¹

Appellants' attempt to compare a detention based on an APB message with the prerequisites of an extradition proceeding is so inapposite that the argument merits no response.

¹Since defendants were acquitted of the charges founded on the search of the car trunk, this appeal is not concerned with the legality of the warrantless search.

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Although Lemmons was initially stopped for speeding, his arrest was based on the radio report. So, defendants' reference to a custodial arrest for a traffic infraction has no relevancy whatsoever.

POINT II.

When the unconcealed handguns were found in the car, the statutory presumption attached to all the occupants thereof and established their guilt beyond a reasonable doubt.

In the circumstances of its application here, the presumption is constitutional.

As stated before, the convictions of Lemmons, Hardrick and Allen stemmed from their alleged possession of the handguns found in the automobile occupied by all four defendants. Such possession was established solely through the application of the statutory provision which makes the presence of a weapon in an automobile "presumptive evidence of its possession by all persons occupying such automobile at the time such weapon . . . is found," unless it is found upon the person of one of the occupants (PL 265.15, subd. 3).

As they did on the intermediate appeal, the male defendants again argue that the presumption should not have been invoked against them because the guns were found in a pocketbook belonging to the female defendant and hence were found upon her person. Agreeing with this foggy rationalization, the Appellate Division minority wrongly concluded that recovering the handguns from Marcella's pocketbook was the same as finding them on her person and that the exception to the presumption should have been applied to the ill-used male adults.

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The cynics say that the age of chivalry is long past and they doubt that the noble Galahad really lived. Has male chauvinism replaced the spirit of romance and righteousness?

At the trial Mr. Goldberger represented only the female teenager and, when she appeared for sentence, he made an impassioned plea in her behalf. Seemingly dedicated to her cause, counsel assured the court that, although Marcella had foolishly become involved with these men and allowed herself to be used to hold the weapons, the two guns found in her purse were not hers—not "those two cannon." Aided by a favorable presentence report, counsel achieved his goal of leniency for his client: the nubile damsel was given YO treatment, her conviction was vacated and she was placed on probation.

On these appeals Mr. Goldberger also represents the male defendants and perforce the noble Galahad has had to assume a very different posture. Now he pleads that these men, all with criminal records, never knew or even suspected that "those two cannon" were in Marcella's pocketbook. Now he urges that, instead of the naive teenager being the patsy for her experienced traveling companions, these hardened lawbreakers were the hapless scapegoats for Marcella's need of a personal arsenal. Now the tender thing is no longer the victim—she is the lone culprit! Believable? Maybe in some dream world, but surely incredible in this mortal vale.

Defendants first contend that the contents of a pocketbook are the private possessions of the owner of the handbag, and they attempt to liken such personal possession of the contents to a concealed weapon found during a "frisk" search of a person. The alleged analog

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just does not jell because the premise therefor ignores the sole reason for the validity of the stop-and-frisk principle.

For instance, in *People v. Puguch* (15 N. Y. 2d 65, cert. den. 380 U. S. 936), the warrantless search of defendant's brief case, already seized by the police, was held permissible solely because the search protected the police officer from possible injury or danger. More recently, a search of defendant's pocketbook, which turned up a gun, was upheld in *People v. Moore* (32 N. Y. 2d 67), because the owner had acceded to the police request and consented to a search of the handbag. And in *People v. Bowles* (29 A. D. 2d 996), the police searched the shorn trousers of defendant, the identified assaultant in an armed robbery, to seize the weapon used in the robbery and to recover other hard evidence.

This court announced in *People v. Sibron* (18 N. Y. 2d 603), that stop-and-frisk searches should be narrowly circumscribed and would be upheld only if made to protect a police officer from injury or danger. Here, an unconcealed gun in an open pocketbook was exposed to plain view in the front of an automobile. Such a circumstance certainly permits the inference that the other occupants of the car—all traveling together from Detroit to New York—were aware of the presence of the guns in the pocketbook. It requires a very volatile imagination indeed to envision a similarity in such a situation and a stop-and-frisk search.

People v. Anthony (21 A. D. 2d 666, cert. den. 379 U. S. 983) answers defendants' contention. It was there held that the statute (former PL 1899, now PL 265.15) created a presumption that "all of the persons 'found in such automobile at the time such weapon is found' illegally

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possessed the pistol" and that when, as here, the police officer kept the car under observation and saw the handgun inside the vehicle before anyone other than one of the occupants entered or left the car, then the presumption attached to every occupant of the automobile.

Defendants further contend that if the presumption applies to the instant case, then it is unconstitutional as here applied; and they rely upon *Leary v. United States* (395 U. S. 6).

This court has held that *Leary* does not impose an extra burden to the acceptance of a presumption based upon a rational connection between the fact proved and the fact presumed (*People v. McCaleb*, 25 N. Y. 2d 394). Moreover, the constitutionality of this sort of presumption has been well established.

People v. Terra, 303 N. Y. 332, app. dismd. 342 U. S. 938;
People v. McCaleb, 25 N. Y. 2d 394, *supra*;
People v. Resiman, 29 N. Y. 2d 278;
People v. DeLeon, 32 N. Y. 2d 944.

Here, the statutory presumption presents a truly rational connection between the fact proved (presence of the handguns in the car) and the fact presumed (possession of the guns by all occupants of the car at the time they were found). The presumption is neither conclusory nor arbitrary.

No acceptable explanation was ever advanced to warrant rejection of the presumptive evidence that the other defendants knew of the guns stowed in the young girl's handbag. When such defendants failed to offer a credible explanation for the presence of the guns in the automobile, their guilt was proved beyond a reasonable doubt.

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POINT III.

In its charge to the jury, the court properly explained the meaning of reasonable doubt.

Defendants also criticize the trial court's charge on reasonable doubt. The criticism is limited to that part of the court's definition where, to paraphrase the instruction, the trial judge indicated that a reasonable doubt is one which a juror could explain if he were asked to do so.

Where a criticism is limited to a part of a definition, the criticized part must be read in conjunction with the entire definition of which it forms a portion. When read in such context, it is crystal clear that the court's explanation helped, rather than hindered, the jurors in understanding the difference between a reasonable doubt and a vague or inexplicable doubt.

Indeed, the charge used the definition of reasonable doubt as given by this court in *People v. Jones* (27 N. Y. 2d 222, 226-227).

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CONCLUSION.

This court lacks jurisdiction to review affirmed findings of fact.

The handguns were observed in plain view and were lawfully seized.

The presumption attached to all occupants of the automobile did not infringe upon defendants' constitutional rights and such evidence of possession was not rebutted by any credible explanation for the guns' presence.

The charge was free from error.

Therefore, the order of the Appellate Division should be affirmed.

Respectfully submitted,

FRANCIS J. VOGT,
District Attorney, Ulster County,
Attorney for Respondent.

EDWARD M. P. GREENE,
On the Brief.

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RA 1

APPENDIX.

Decision on the Suppression Motions.

STATE OF NEW YORK, COUNTY COURT,

COUNTY OF ULSTER.

THE PEOPLE OF THE STATE OF NEW YORK

against

MELVIN LEMMONS, RAYMOND HARDRICK, SAMUEL ALLEN
and MARCELLA MURPHY,
Defendants.

(Ulster County, Special Term, Final Papers submitted
Jan. 2, 1974)

(Judge Raymond J. Mino, Presiding)

Appearances:

Aaron Klein, Esq., Attorney for Defendant, Melvin Lemmons.

Joseph Torraca, Esq., Attorney for Defendants, Raymond Hardrick and Samuel Allen.

Paul Goldberger, Esq., Attorney for Defendant, Marcella Murphy.

Hon. Francis J. Vogt, District Attorney for the People of the State of New York, (Ellen G. Donovan, of counsel).

RAYMOND J. MINO, Judge:

This case comes before this Court on a motion to suppress (CPL 710.20) evidence consisting of two pistols, a

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Decision on the Suppression Motions

machine gun and a quantity of heroin to be used against the four named defendants on various illegal possession charges.

The facts as found by this Court at the suppression hearing are:

On March 28, 1973, at noontime, two state troopers stopped a motor vehicle on the Thruway for speeding. This vehicle contained the four defendants. The vehicle had New York State plates, but the driver, Lemmons, had a Michigan driver's license and no vehicle registration at all. The trooper radioed from his patrol car the name of the driver and a description of the car. The return message informed the troopers that Lemmons was wanted on a fugitive warrant for a weapons charge in Michigan. Lemmons was thereupon placed under arrest. One trooper then returned to the defendant's car and stood by the window on the passenger side. From this position he peered into a large open handbag situated between the window and the front seat. He was familiar with handguns and recognized the top of a pistol in the handbag. He placed the three remaining defendants under arrest for the possession of the pistol. A further search of the handbag revealed a second pistol. All four defendants were brought to the trooper barracks. About two hours later another trooper drove the defendant's car to the barracks. The defendants had no key to the trunk so troopers pried open the locked trunk without a warrant. The trunk contained the machine gun and heroin.

A consideration of the law as applied to the facts recited above, must begin with the issue, whether the arrest of Lemmons was valid. It is a clear rule of law that a police officer may arrest a person for a crime when he has reasonable cause to believe that such person has committed a crime, whether in his presence or not (CPL §140.10, subd. 1 [b]). Reasonable cause to believe is, of course, similar to probable cause (*People v. Lombardi*, 18 A. D. 2d 177,

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Decision on the Suppression Motions

18 N. Y. 2d 1014). The law is also clear that the arresting officer himself does not need the personal knowledge of the facts constituting probable cause. He may rely upon communications with other officers if the police as a whole have information sufficient to provide probable cause (*People v. Smith*, 31 A. D. 2d 863). That the information ultimately came from a sister state cannot invalidate any such arrest (CPL §570.34). The only perplexing factor in our case is that the Michigan arrest warrant was dismissed several days before the incident on the Thruway. The radio information, therefore, was to that extent inaccurate. Our Appellate Division has spoken clearly that an arrest made pursuant to a warrant, which was invalid at that point in time, is still a lawful arrest (*People v. LaBelle*, 37 A. D. 2d 135). So, in our case, it must be held that the arrest of Lemmons was valid.

The second issue is, whether the seizure of the two pistols in defendant Murphy's handbag was valid. There can be no question that a police officer may validly seize contraband in plain view provided he has a legal right to be in the position from which this view was made (*Ker v. California*, 274 U. S. 23). The testimony of Trooper Askew was that he peered through the passenger window into the open handbag and from his experience immediately recognized the top of a pistol. The pistol was in plain view. The trooper had every right to stand next to the vehicle. Therefore, the seizure was lawful.

The third issue is whether the search of the trunk and the seizure of the contraband therein was valid. The objection to the search and seizure was that it was done without a warrant, at a time and place removed from the point of arrest. The Supreme Court has held that an entire car, including the trunk may be searched, without a warrant when probable cause exists for the search apart from the arrest (*Chambers v. Maroney*, 399 U. S. 42). This concept is known as independent probable cause. Our Court

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Decision on the Suppression Motions

of Appeals recognizes that under this concept the limitations of space and time governing searches incident to an arrest do not apply (*People v. Brown*, 23 N. Y. 2d 232, 236). The Appellate Division, Third Department, has applied this theory to sustain warrantless searches of automobiles away from the point of the arrest provided probable cause existed for that search (See *People v. LaBelle*, *supra*; *People v. Baer*, 37 A. D. 2d 150). The facts of our case indicate that defendants Murphy, Hardrick and Allen had all been arrested for possession of pistols in the car. Also, Lemmons had been discovered as being wanted on a fugitive warrant on a weapons violation. Whether this warrant was outdated is certainly curcial to the validity of any arrest pursuant thereto, but the legal effectiveness of the warrant is irrelevant to any use of the warrant as just another fact which may go to support probable cause for a search, independent of an arrest. With all the people implicated in a weapons violation in some manner, was it not reasonable to believe that other weapons were present in the car. These facts which confronted the police dictated their action in entering the trunk. Their actions must be governed by the standard applied to "a reasonable and prudent man, not a legal technician." (*Brinegar v. U. S.*, 338 U. S. 130). The standard as applied to this case, shows that the officers did have probable cause to open that trunk. The denial by the defendants that they had a key, justified prying open the trunk (*People v. Baer*, *supra*).

The motion to suppress is in all respects denied.
So ordered.

Dated: February 6, 1974

s/ RAYMOND J. MINO
County Judge of Ulster County

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RA 5

Excerpts From the Charge to the Jury.

(729) The Court: Ladies and gentlemen of the jury, we now come to that part of the case, as I mentioned yesterday, where the Court must charge the jury as to the law of this case so that you may apply that law to the facts as you find them during your deliberations.

I must inform you at the very outset that in this case, as in every other case that comes into (730) a court of this jurisdiction, you have one province, and I have another. Yours is the province of the fact; mine, as the Court, is the province of the law. According to our system of justice, it is provided that the Court decides all questions of law which arise in the course of the trial and that I must charge you, as members of this jury, on all matters of law which I think necessary for your information in reaching a verdict.

• • •
(734) Under our law, every defendant in a criminal trial starts the trial with the presumption in his favor that he is innocent, and this presumption follows him throughout the entire trial and remains with him until such time as you, by your verdict, find him or her guilty beyond a reasonable doubt or innocent of the charge. If you find him or her not guilty, then, of course, this presumption ripens into an established fact. On the other hand, if you find him or her guilty, then this presumption has been overcome and is destroyed.

Our law provides also that the burden of proving the defendant's guilt rests upon the shoulders of the People, and such guilt must be established beyond a reasonable doubt before any (735) conviction can result. This burden never shifts. In other words, it rests upon the shoulders of the People through the entire trial and never shifts to the shoulders of the defendant. The defendant at no time is ever called upon to establish his innocence or to prove any defense whatsoever. It is the burden of the People to establish to your satisfaction beyond a reasonable doubt

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RA 6

Excerpts From the Charge to the Jury

—each of your satisfactions—that these defendants committed the crimes they were accused of having committed. If they have proved this to you to your satisfaction, that is the burden of the People. As I said before, the defendants do not have to prove anything.

• • •

You have heard the term "reasonable doubt" mentioned here many times, particularly during the course of the selection of the jury. As you probably know, our law provides that in criminal (736) cases the norm of proof is reasonable doubt because our law provides that in case of a reasonable doubt, whether the guilt of a defendant is satisfactorily shown, he is entitled to an acquittal. That simply means that if a juror entertains a doubt as to the guilt of the defendant, it must be such a doubt for which the juror could give a reasonable explanation if he were requested to do so. It must be a doubt founded on common sense, one for which the juror could reasonably and logically account. A reasonable doubt is what the words themselves imply—a doubt founded in reason. It is not a mere whim, a guess or surmise, nor is it a mere subterfuge to which resort may be had to avoid doing a disagreeable thing. It is such a doubt as a reasonable man may entertain after a careful and honest consideration and review of the evidence. It must be founded in reason and must survive the test of reasoning or the mental process of reasonable examination.

Our law, in substance, provides that the People must prove the guilt of a defendant in a criminal case beyond a reasonable doubt. Our law does not say that the People must prove the guilt of (737) a defendant beyond a doubt based in reason. It does not say that the People must prove the guilt of a defendant beyond all doubt. For a reasonable doubt may arise from the evidence itself, as from the lips of the witnesses here, or from the evidence.

• • •

A54

RA 7

Excerpts From the Charge to the Jury

(742) As I said before, these are what I consider to be possessory crimes. Possession, as defined in our Penal Law, means to have physical possession or otherwise to exercise dominion and control over tangible property such as we have here—the drugs, the machine gun and the two handguns. As so defined, possession means actual physical possession, just as having the drugs or the weapons in one's hand, in one's home or other place under one's exclusive control, or constructive possession which may exist without personal dominion over the drugs or weapons but with the intent and ability to retain such control or dominion.

. . .

(743) Our Penal Law also provides that the presence in an automobile of any machine gun or of any handgun or firearm which is loaded is presumptive evidence of their unlawful possession.

In other words, these presumptions or this latter presumption upon proof of the presence of the machine gun and the hand weapons, you may infer and draw a conclusion that such prohibited weapon was possessed by each of the defendants who occupied the automobile at the time when such instruments were found. The presumption or presumptions is effective only so long as there is no substantial evidence contradicting the conclusion flowing from the presumption, and the presumption is said to disappear when such contradictory evidence is adduced.

To prove their accusations beyond a reasonable doubt, the People here introduced evidence—and I am going to very briefly outline it—to establish the stopping of the automobile on the Thruway; that the automobile was occupied by the four defendants at the time the automobile was stopped; that two concealable weapons or handguns (744) were found in the purse of one of the defendants which was either on the front seat or on the floor in the front of the automobile;

. . .

A55

RAS

Excerpts From the Charge to the Jury

(745) Now, in order to find any of the defendants guilty of the unlawful possession of the weapons, the machine gun, the .45 and the .38, you must be satisfied beyond a reasonable doubt that the defendants possessed the machine gun and the .45 and the .38, possessed it as I defined it to you before. I want to emphasize that insofar as the guns are concerned, the mere possession of the machine gun, the .45 and the .38 is the essence of the crime of illegal possession, and guilty knowledge of such possession or (746) an intent to illegally possess such machine gun and other weapons is not a necessary element of the crime with which these defendants are charged.

Accordingly, you would be warranted in returning a verdict of guilt against the defendants or defendant if you find the defendants or defendant was in possession of a machine gun and the other weapons and that the fact of possession was proven to you by the People beyond a reasonable doubt, and an element of such proof is the reasonable presumption of illegal possession of a machine gun or the presumption of illegal possession of firearms, as I have just before explained to you.

There is a difference in the presumption insofar as the dangerous drug is concerned. The presumption says, "presumed knowing possession." Insofar as the weapons is concerned, all you need is possession, and then the presumption says it is illegal.

. . .

(749) (The following proceedings were held outside of the presence of the jurors.)

The Court: Are there any exceptions to the charge by the Prosecution?

Miss Donovan: No, Your Honor.

The Court: By Defense?

Mr. Goldberger: Yes, Judge. Just one second. I believe these exceptions are taken on behalf of all of the defendants. First of all, I except to Your Honor's use of the

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Excerpts From the Charge to the Jury

word and the term "innocence" in regard to a jury verdict. On at least two occasions the Court used the term "innocent." The term should not be used.

The Court: Guilty or not guilty you mean, right?
(750) Mr. Goldberger: Secondly, I except to the fact that the Court did not charge the jury on the question of reasonable doubt that they have to find the defendant guilty beyond a reasonable doubt and for a moral certainty. The term "moral certainty" was not used by the Court.

Thirdly, I except to the fact that when the Court charged that the jury must not go outside of the evidence that it failed to immediately qualify that by saying "but of course may consider the lack of evidence in the case."

I fourthly except to the Court's improper explanation of the stipulation. I think the Court confused the stipulation. I think what the Court did by explaining the stipulation was that it inferred guilt of the defendants through that stipulation.

The Court: Will you expound on that?

Mr. Goldberger: I don't recall exactly what the Court said with regard to the stipulation, but I think the Court said that we stipulated that the guns were possessed unlawfully. We have never stipulated to that.

(751) The Court: I thought you did.

Mr. Goldberger: No. We only stipulated to the fact that the guns were operable.

The Court: Is there any contention they were unlawfully possessed?

Mr. Goldberger: There is a great contention that these defendants did not unlawfully possess the guns.

• • •

Mr. Goldberger: I also except to the fact (752) that the Court did not charge that contradictory evidence need not be affirmative evidence but may be in the form of negative evidence or lack of evidence. I also except to the fact that the Court has not charged at least as of yet—

A57

Excerpts From the Charge to the Jury

and I request the Court to do so—that if there is a conflict among the members of the jury with regard to any item of fact, particularly the one item of fact totally in dispute here as to the clothes in the trunk of the car, that they be allowed to reread, have that portion of the testimony reread to them.

The Court: You maintain the Court must charge that?

Mr. Goldberger: I maintain the Court must charge that they have a right to reread the testimony if there is a conflict among the members of the jury.

I also except to the fact that in regard to the portion of the Court's charge dealing with weapons that the Court did not charge knowledge on the part of the defendant with regard to the possession of a weapon must be proved, not the mere possession.

The Court: Did you listen to my charge?

(753) Mr. Goldberger: Yes, I did.

The Court: You say I didn't say they had to prove knowledge?

Mr. Goldberger: In regard to the weapon part of the charge, it is my belief that the Court stated there was a difference in the presumptions; in that regard to the weapons they just had to prove possession.

The Court: The weapons, that's correct; and that's the law.

Mr. Goldberger: Well, I except to that. I don't agree that that is the law.

Mr. Klein: I have one further exception to make. I presume my colleagues join with me. The Court in marshalling the facts—

The Court: I didn't marshal any facts.

Mr. Klein: Well, the Court in whatever exposition of facts was given stated that it was the contention of the Prosecution that the handbag containing handguns was either on the seat or on the floor. This is not only not their contention, it was contrary to the indictment in this case.

RA 11

Excerpts From the Charge to the Jury

The Court: I don't understand that. What (754) do you mean? Please explain. I said very clearly that the testimony was it was either on the seat or on the front floor. Wasn't that a fact?

Mr. Klein: I say the indictment here is based not on an "either or."

The Court: What does it say in the indictment?

Mr. Klein: The indictment is based upon the Grand Jury testimony.

The Court: It says here "they possessed it." That is all they say in the indictment. I can't understand you.

Mr. Klein: I know that, on the basis of the Grand Jury testimony, and there is only one theory in the testimony.

The Court: What is the theory?

Mr. Klein: The testimony of the Grand Jury was that it was on the seat of the car, not either on the seat or the floor.

The Court: Suppose the jury finds it was on the floor; does that do away with the indictment?

Mr. Klein: I am only asking in fairness—

The Court: In fairness of what?

(755) Mr. Klein: That there is not an "either or" proposition in this case.

The Court: I am sorry. I don't understand you. Mr. Torraca?

Mr. Torraca: Mr. Goldberger and Mr. Klein expressed them, and I join in the motion.

The Court: What motion?

Mr. Torraca: All the motions Mr. Goldberger made.

The Court: There are no motions before me.

Mr. Torraca: Well, the requests to charge.

The Court: There is only one request that I have.

Mr. Goldberger: All the others were exceptions.

Mr. Torraca: Exceptions.

The Court: Well, I want the record to be clear. I think I will bring the jury back to clarify that stipula-

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RA 12

Excerpts From the Charge to the Jury

tion because I thought that the stipulation said that the possession was unlawful possession.

Mr. Goldberger: Absolutely not. The only (756) thing that stipulation says is that the drugs were heroin and that the guns were operable and that if the experts were called that they would so testify.

The Court: Is that correct, Miss Donovan?

Miss Donovan: Yes.

The Court: All right. Bring the jury back.

(The jury returned to the Courtroom, and the following proceedings were had:)

The Court: Counsel were nice enough while you were out to call to my attention a portion of my charge which needs some clarification because I was under the impression that the stipulation which I mentioned during the course of my charge said something that apparently it did not say.

. . .

(757) I come back to the stipulation relative to the weapons where again I said that I was under (758) the impression that the stipulation also said that the possession of the weapons was illegal or unlawful. I am sorry. I said that they had stipulated, one, it was a machine gun; two, that the firearms were loaded. One was a .45 caliber, and the other was a .38 caliber, and I thought the stipulation said that they didn't have the right to possess it or their possession was unlawful. Apparently the stipulation did not say that.

I charge you that it is unlawful or illegal for a person to have in his possession a machine gun. It is unlawful or illegal for a person to have in his possession any loaded firearms unless that person has a license to carry those loaded firearms or unless that person comes under one of the exemptions in the Penal Law permitting the having of machines guns—for instance, the army can have

A60

RA 13

Excerpts From the Charge to the Jury

machine guns; that does not violate the statute—or permitting the possession of loaded firearms.

And I charge you that under the facts of this case, as developed here during this trial, the (750) defendants do not come under any of the exemptions in the Penal Law authorizing the possession of machine guns or loaded firearms.

I assume there are exceptions to that charge!

Mr. Goldberger: I still at this point have to except to Your Honor's explanation. I still don't think it is the proper—

The Court: All right. You have excepted.

Mr. Goldberger: Yes.

The Court: Everybody else joins; is that right?

Mr. Goldberger: Yes, they do.

The Court: Are there any requests by the People?

Miss Donovan: Only as submitted yesterday, Your Honor. I submitted one matter.

The Court: I think I covered that in my charge. Now, are there any requests by the Defense?

Mr. Goldberger: I submitted one this morning.

The Court: As set forth in Defendant Murphy Exhibit B?

(760) Mr. Goldberger: It applies to all defendants, Judge.

The Court: I will charge that request. The presumption or presumptions which I discussed with the jury relative to the drugs or weapons in this case need not be rebutted by affirmative proof or affirmative evidence but may be rebutted by any evidence or lack of any evidence in the case.

Mr. Klein: May it please the Court, I did make a request for an additional charge during the absence of the jury.

The Court: It is news to me.

Mr. Goldberger: Concerning the rereading.

Mr. Klein: The rereading of testimony.

A61

RA 14

Excerpts From the Charge to the Jury

The Court: I am not going to grant the request.
Mr. Klein: I didn't understand you made a decision.
The Court: I didn't know it was a request. It was an exception, not a request.
Swear the bailiffs.

(The bailiffs were duly sworn.)

(765) (Whereupon, at 12:10 p.m., the jury again retired to enter upon further deliberation. At 12:30 p.m., the jury was taken to lunch and returned therefrom at 2:00 p.m. and again entered upon their deliberations, and at 3:45 p.m. the jury returned to the Courtroom, and the following proceedings were had:)

(766) The Court: Call the roll.

(A roll call of the jurors showed all jurors present.)

The Court: Let the record indicate the presence of the defendants in the Courtroom together with their respective attorneys. I have here a request from the jury which reads as follows: "In the event the jury cannot reach agreement on one or more counts but is in agreement on the other counts, does this result in a hung jury on all counts?"

The answer to that question is, "No, it does not." Does that answer your question?

The Foreman: Yes, Your Honor.

The Court: Any exceptions to that charge?

Mr. Goldberger: No, Your Honor.

Mr. Torraca: No.

Miss Donovan: No.

(Whereupon, at 4:47 p.m., the jury again retired to enter upon their deliberations and at 5:45 p.m. returned and rendered the following verdict:)

A 62

RA 15

The Verdict.

(767) (A roll call of the jurors showed all jurors being present.)

The Clerk: Ladies and gentlemen of the jury, have you arrived at a verdict?

The Foreman: Yes, we have.

The Clerk: How do you find in the case of the defendant Melvin Lemmons on the first count?

The Foreman: Not guilty.

The Clerk: Second count?

The Foreman: Not guilty.

The Clerk: Third count?

The Foreman: Guilty.

The Clerk: Fourth count?

The Foreman: Guilty.

The Clerk: Was that unanimous?

The Foreman: Unanimous.

The Clerk: Harken to your verdict as the Court records it in the case of the defendant Melvin Lemmons, you find him on the first count, not guilty; second count, not guilty; third count, guilty; and fourth count, guilty?

The Foreman: Right.

The Clerk: And that was unanimous. In (763) the case of the defendant Raymond Hardrick, on the first count?

The Foreman: Jury finds not guilty.

The Clerk: Second count?

The Foreman: Not guilty.

The Clerk: Third count?

The Foreman: Guilty.

The Clerk: Fourth count?

The Foreman: Guilty.

The Clerk: Harken to your verdict as the Court records it in the case of the defendant Raymond Hardrick, on the first count, not guilty; second count, not guilty; third count, guilty; fourth count, guilty. Was that unanimous?

The Foreman: Yes, it was.

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RA 16

The Verdict

The Clerk: In the case of the defendant Samuel Allen, on the first count?

The Foreman: Not guilty.

The Clerk: Second count?

The Foreman: Not guilty.

The Clerk: Third count?

The Foreman: Guilty.

The Clerk: Fourth count?

(769) The Foreman: Guilty.

The Clerk: Harken to your verdict as the Court records the verdict in the case of Samuel Allen, on the first count, not guilty; on the second count, not guilty; third count, guilty; fourth count, guilty. Was that unanimous?

The Foreman: Yes, it was.

The Clerk: In the case of the defendant Marcella Murphy, on the first count?

The Foreman: Not guilty.

The Clerk: Second count?

The Foreman: Not guilty.

The Clerk: Third count?

The Foreman: Guilty.

The Clerk: Fourth count?

The Foreman: Guilty.

The Clerk: Harken to your verdict, in the case of the defendant Marcella Murphy, on the first count, not guilty; on the second count, not guilty; on the third count, guilty; on the fourth count, guilty. Was that unanimous?

The Foreman: Yes, it was.

The Court: All right, ladies and gentlemen (770) —by the way, does anybody want the jury polled?

Mr. Goldberger: No.

Miss Donovan: No.

. . .

A64

RA 17

The Verdict

(771) The Court: All right, Court is recessed until 10:00. Insofar as Lemmons is concerned, he is presently out on bail, and he is charged with something else. The record should show that the bail insofar as Lemmons is concerned in this case has been revoked. May I have your attention, please? I have to fix a date for sentencing. Are all the attorneys here?

(E. Michael Kavanagh, Esq. appeared for the People in place of Ellen G. Donovan, Esq.)

The Court: This is May the 15th. I anticipate that our Probation Department requires at least some time to prepare pre-sentence reports for these four convicted defendants. I will therefore set the date as June 12 at 11:00 a.m. for a pretrial conference.

. . .

(773) The Court: All right. June 12.

Mr. Klein: June 12 for all purposes.

The Court: The bail is revoked in the case of Lemmons. Bail is continued in the case of Murphy. The defendants are remanded.

(Whereupon, at 5:55 p.m., the proceedings in the above-entitled matter were recessed until June 12, 1974 at 10:00 a.m.)

. . .

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RA 18

The Sentence Proceedings.

(775) Pursuant to adjournment, Ulster County Court reconvened at the Court House, Kingston, New York, on the 28th day of June, 1974, at 11:00 o'clock, A. M.

The Hon. Raymond J. Mino, County Judge, presiding.

Miss Donovan: Indictment number 25-73, People against Raymond Hardrick and Samuel Allen.

The Court: One at a time. Which one is Hardrick?

Hardrick: I am.

The Court: I want the record to indicate and reflect that the Court granted to the attorneys for the defendants an opportunity to make motions to dismiss the indictment and to set aside the verdict in this case as being contrary to the facts and contrary to the law and such a motion was made in writing by Mr. Torraca on behalf of Samuel Allen and Raymond Hardrick and by Mr. Klein on behalf of Melvin Lemmons and appropriate memoranda have been filed with the Court and the Court has considered the matter at length and read the cases cited by both sides and after due deliberation having been had by this Court, the motion to set aside the verdict of guilty and (776) dismiss the indictment is denied. I am going to file these motion papers with the Clerk so they will be incorporated and become part of the Record in this case in the event there is an appeal.

Now, is the defendant Hardrick ready for sentencing at this time?

Mr. Torraca: Yes, he is, your Honor.

The Court: Is there something that the District Attorney wishes to say factually relevant to the sentence?

Miss Donovan: Yes, your Honor. We feel that the prior record of this defendant, Raymond Hardrick, and the facts as they were elicited during the trial, would warrant a period of incarceration in the state penitentiary.

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The Court: Is that a fact or conclusion?

Miss Donovan: I'd say it's a fact, your Honor.

The Court: You call your conclusion a fact?

Miss Donovan: That's right.

The Court: It's a fact that he has a record but when you say it warrants a term in the penitentiary, that's a conclusion, obviously.

Mr. Torraca, do you have any factual (777) remarks that you want to make other than conclusions?

Mr. Torraca: My remarks addressed to the Court, will cover the co-defendant, Allen, also.

The Court: What?

Mr. Torraca: My remarks addressed to the Court, will cover the co-defendant, Allen, as well as the defendant, Hardrick.

The Court: Go ahead.

Mr. Torraca: Your Honor, the remarks by the District Attorney point out the fact that we are here to pass judgment on these defendants for prior transgressions. Are we in fact sentencing these men because of their prior transgressions? Are we sentencing them because of retribution because a jury has acquitted them on other counts in the indictment? It's like shooting fish in a barrel. I don't know what facts were revealed to your Honor in the Pre-Sentence Report. Under Section 390.50 of the C.P.L. I realize that your Honor has discretionary powers to let other persons peruse or see the Pre-Sentence Report or portions thereof. Therefore, I formally request the Court, although I have informally asked the Court prior to this date, to look at the Pre-Sentence Report and your Honor informed me that I could not do (778) so which is within the purview of the Statute. I realize that for me to make a plea or to point out any facts which may be before your Honor to controvert those facts in the Pre-Sentence Report I cannot do so without first seeing what is before your Honor. It is for this reason

The Sentence Proceedings

I am, as defense counsel for both defendants, at a loss to know what is before your Honor and what is in your Honor's mind as far as sentencing is concerned. Therefore I again formally request the Court at this point to utilize its discretionary power to let counsel see, if not the entire Pre-Sentence Report, at least portions thereof so that I may either concur or confer with my clients concerning the facts alleged in that report and maybe influence the Court in some manner as to why there should be some mitigation of sentence to be imposed.

The Court: Well, insofar as the Pre-Sentence Report is concerned, it is rather brief and the description of the offense is certainly the same as it was during the course of the trial basically except the defendant claims he didn't know the weapons were there and could therefore not be held responsible and it also gives his criminal record which I am sure you are familiar (779) with and his physical and mental health which obviously seems to be in good order and he states that he feels that he has been railroaded from the beginning and that there was absolutely no evidence in the trial to tie him to any of the weapons or contraband found in the vehicle. That is how he feels.

Mr. Torraca: I think those are true statements of this defendant and also of the co-defendant, Allen.

The Court: It says Hardrick appears very calm and when discussing his plight, asserting his innocence, claiming that his constitutional rights have been violated and that he has been "railroaded." Other than that, as I said, you are familiar with his past record. I don't have to recite that to you.

Mr. Torraca: No.

The Court: I'll deny any further requests to inspect the Pre-Sentence Report.

Mr. Torraca: One thing further, your Honor. While the defendants have been incarcerated in the Ulster

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County Jail which is approximately sixteen months, their record in the jail, from what I have been informed, has been of the nature (780) that they have assisted in a program of instructing art to other inmates. They have, on one or more occasions, assisted in the County Jail in talking to other inmates in quelling them and seeing to it that they calmed down a bit. Also the Court well knows that the sixteen months comes off the top of any sentence your Honor may impose.

The Court: Not necessarily.

Mr. Torraca: If your Honor may so direct that the time spent in jail may apply to the minimum?

The Court: I'll arrange that.

Mr. Torraca: I might inform the Court that after the sentencing I will take the matter of the Appeal up with the Appellate Court. It is a rather close question and I think the statements made by Hardrick that you referred to, bears some fruit. I'm hopeful the Appellate Court might look at the appeal we intend to propose and cast their decision favorably and if not, then I will go to the next highest Court in the State.

The Court: Well, there is no question about the fact that there was a close question of law that was involved in this matter particularly (781) as to the validity of the search made by the police officers. I held that it was valid but the Appellate Division may find otherwise.

Is there something the defendant himself wishes to say at this time?

Hardrick: No.

The Court: All right. I have before me, as I indicated before, your previous record, Hardrick, and it does indicate that you have had some familiarity with penal institutions in the past. Now, it is a fact that you were convicted of a Class D felony, Possession of Weapons, two Counts. Therefore it is the sentence of this Court that as to the Third Count of the Indictment which

The Sentence Proceedings

charges you with possession of a forty-five automatic pistol loaded with ammunition, March 28th, 1973, it is the judgment of this Court that for that felony you be sentenced to an indeterminate sentence of imprisonment which shall have a maximum term of 7 years and the Court imposes a minimum term of two and one-third years. Now, the reason I am imposing a minimum term is so that this defendant can receive jail time credit off his minimum. Otherwise the minimum will be fixed by the Board of Parole. (782) I direct also that he be committed to the custody of the New York State Department of Correction and delivered to Clinton Correctional Facility at Dannemora, New York, there to be dealt with in accordance with the laws pertaining to his sentence. The defendant is remanded.

Mr. Torraca: There was another Count.

The Court: On the Fourth Count I impose the same identical sentence and direct they run concurrently.

Mr. Torraca: On behalf of the defendant, Hardrick, I make application at this time to delay the transportation of the prisoner to Dannemora for one week at the defendant's request because there is an Art Show taking place of the defendant's exhibits. The Art Show is to take place in the City of Kingston here. The defendant requests an extension of one week.

The Court: That is between you and the Sheriff. I have no control over that. Remanded.

Mr. Torraca: The defendant, Samuel Allen, is ready for sentence, your Honor.

The Court: Is there something the District Attorney wants to say factually concerning this defendant?

(783) Miss Donovan: The same recommendation.

The Court: Mr. Torraca, is there something you wish to say?

Mr. Torraca: The remarks I made previously, as a matter of fact, my introductory remarks that I made

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relative to the defendant Hardrick would equally apply in every instance to the defendant Allen.

The Court: Well, I just thought you might be interested to know that he indicates in the Pre-Sentence Report that his constitutional rights have been violated since the day of his arrest. He felt that if he had not been tried with the other three members, he would have been placed on the stand and testified in his own defense and then his past record would have been revealed. He does feel, however, that under the circumstances he did receive a fair trial but the law that makes him responsible for the items in the trunk as well as the two hand guns in the pocketbook is irrational. Now is there something that the defendant wants to say prior to the sentence?

Allen: No, your Honor.

The Court: It is ordered and adjudged (784) by this Court that the said Samuel Allen, having been convicted under the Third Count of the indictment with possession of a 45 caliber hand gun, be sentenced to an indeterminate sentence of imprisonment which shall have a maximum term of 7 years and a minimum period of imprisonment of two and one-third years and the reason I am imposing a minimum term is so that he will receive jail time credit off his minimum and it is further directed by this Court that the said defendant be committed to the custody of the New York State Department of Correction and delivered to Clinton Correctional Facility at Dannemora, New York, there to be dealt with in accordance with the laws pertaining to his sentence. I direct the same identical sentence be imposed on the Fourth Count of the indictment and direct that the sentences run concurrently. The defendant is remanded.

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(788) (Whereupon, at 11:30 a.m., the proceedings in the above-entitled matter were reconvened.)

The Court: I will hear the motion now on the application by Mr. Klein to set aside the verdict in the case of the People against Melvin Lemmons.

Mr. Klein: May it please the Court, I would like to preambule my argument by saying that these defendants, of course, should not, must not be treated as conglomerate. In other words, each one is an individual, and each case must stand or fall on its individual facts and circumstances.

The motion I have made on behalf of my client, Melvin Lemmons, is far different in content, scope and legality to any motions made on behalf of any of the other co-defendants, all of whom, of course, were tried together. Now, necessarily, my motion is aimed strictly on the conviction of this defendant Lemmons on the last two counts of the indictment, namely, possession of the handguns, loaded.

The jury returned a verdict of guilty (789) against Mr. Lemmons, as it did, of course, against the co-defendants, but in doing so it did so, I say, in the face of facts which are substantially different with respect to Mr. Lemmons as existed with respect to the other co-defendants.

I am going to for the moment, because it has been argued *ad nauseam* perhaps the Court might think, to avoid coming to grips with the fabricated story of the State Trooper who was the arresting officer, but taking his facts and Trooper Emsing's facts and the situation that existed, I say that there is no way for a verdict of guilty to have been rendered against this defendant for possession of the handguns; and this is my premise. As I say, I am leaving aside the question of the lawful nature of the search and seizure.

The facts, as the Court, I think will recall—I have trouble remembering a few months back, but I did re-

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view it—are that the car was stopped, of which Lemmons was the driver, on the Thruway, told to go to the side of the road, went to the side of the road, and originally the officer said, "You are speeding. We will give you a citation. (790) You can send it in by mail." But in doing so, he went over to the window, the open window of this two-door car, by the way, and stood right there, took the license and whatever papers he got from Mr. Lemmons, and you will recall there is no testimony whatsoever given by him that there was any handbag or any guns protruding from any handbag or anything of a suspicious nature of any kind that he observed while he was at the window of the car. He then went back to his automobile, the trooper car, where the other trooper was awaiting him, and together they spent some time there. The exact time is not self-evidence, but apparently some considerable time because there was communication with Albany. He went back then—the arresting officer went back to the car—

The Court: I am quite familiar with the facts because I listened to the testimony; so you don't have to repeat the facts.

Mr. Klein: I will only highlight the facts as they relate to this motion.

The Court: All right.

Mr. Klein: Went back to the car and again (791) went to the driver's side, to the driver's door, and took Mr. Lemmons out—whether he made the arrest there or not is not clear—but took him out, and again no testimony whatsoever of the presence of any weapons, of any handbag, of anything. He takes him into custody across the road, and he spent some time searching, handcuffing, putting him in the car and so forth, and then the same trooper goes back across the road and eventually goes around—first of all, looks into the driver's side. He testified to seeing nothing. He testified, as he is passing in

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front of the car, looking forward into the car and only seeing some old clothes lying on the back seat, then he testified that he goes around to the passenger's side of the car, and the three different versions he gives—he testified that simultaneously with opening the door he exposed a woman's handbag. One time he says it was on the seat, another time on the floor, and in this woman's handbag, of course, are the so-called weapons.

He testified as another time that he had looked into the car before he opened the door and saw the weapons exposed, and there was a third time (792) that he said after he opened the door he exposed the bag and the guns.

Now, on this testimony alone, the testimony of the Prosecution's witnesses, it is self-evidence that there was no presence of weapons in or out of the handbag at any time that Lemmons was in the car. There were eye-witnesses to this—the troopers. The presence of a handbag, whether it was on the seat or on the floor and with guns or without guns, whatever the case may be, had to happen, if it happened at all, when Lemmons was away from the car and not anywhere in the vicinage, I think they call it, of the car.

Now, the only case that is used to argue that his presence in the car is not a prerequisite to his being held responsible for possession is *People versus Anthony*, but if you read that case carefully and the record on that case, you realize it has nothing to do with the case we are talking about. Here the police had a car under surveillance in Anthony and watched as the person left the car—it doesn't say how far away he got, incidentally—and saw everything that happened inside and outside (793) the car and with the defendant and then made the arrest and, of course, charged him with possession.

In our case it is just the opposite. They did have the car under surveillance, not necessarily for the ultimate finding, but they were at the car, saw no guns or hand-

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bag on two trips when Lemmons was in the car and only claim to have found the weapons and handbag after Lemmons was out of the car and well secured across the road, having been searched and everything else.

Under the facts in this situation there is a vast difference between the possession of the three who were in the car during the time that the guns were found and the one who was out of the car at all times, at any time the guns were seen or the handbag seen.

So, I make a very strenuous motion addressed, of course, to this court to differentiate between the four defendants with regard to this possession, that this defendant has not been proven guilty beyond a reasonable doubt of possession under the presumption statute in his situation where not only was he not in the car, he was in control of the (794) troopers all during the time that there was no presence of weapons, no presence of the handbag and that only after he was well manacled across the road for the first time did the presence of weapons and handbag manifest themselves.

Of course, I also base my motion on the other grounds set forth in the motion papers.

The Court: Do you wish to be heard, Miss Donovan?

Miss Donovan: Just briefly, Your Honor. I feel that what counsel has argued is, in essence, an argument of fact which was determined by the jury—and I think quite properly so. We do rely on the case cited in our brief to the effect that the defendant had been in the car—in fact, it was the driver—that the car had been under his control; nobody entered or exited between the time the car was stopped until the guns were discovered, and I feel that the jury's verdict on the question of fact should be not upset.

The Court: All right, Mr. Klein, your motion is to set aside the verdict on the ground that the verdict was contrary to the evidence; is that (795) correct?

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Mr. Klein: Yes, it is, Your Honor.

The Court: That motion is denied. Are there any other motions?

Mr. Klein: As I said, the motion was predicated on the fact that the discovery of the fruits of the crime was the result of an illegal search and seizure and, therefore, would not be probative. Of course, that's been previously determined by this court.

The Court: Several times.

Mr. Klein: But I raise it again on this motion.

The Court: All right. Denied.

Mr. Klein: And all other grounds appearing in the record which would make a reversal by a superior court necessary.

The Court: I can't rule on that because I don't know what those grounds are.

Mr. Klein: All implicit in my argument.

The Court: How can I rule? All right, we are awaiting your client; right?

Mr. Klein: May I have an exception, Your (796) Honor?

The Court: Yes.

Mr. Goldberger: Do you want to take Miss Murphy's sentence?

The Court: We are waiting for Melvin Lemmons. If he is not here by 12:00, we will have to wait until tomorrow. I will take Miss Murphy's sentence in the meantime. The record indicates that she is an eligible youth. As such, if she desires, all future proceedings can be held in private.

Mr. Goldberger: Judge, this courtroom is private enough.

The Court: No, it isn't.

Mr. Goldberger: May I approach the bench?
(Discussion off the record.)

The Court: You tell me you want this in privacy?

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Mr. Goldberger: Yes.

The Court: Marcella Murphy requests pursuant to statute all future proceedings be held in private. The Court will comply with that request, as it must, and therefore ask the courtroom to be cleared except for persons involved with Marcella (797) Murphy.

(The courtroom was cleared.)

Mr. Goldberger: We are ready to proceed. My understanding is that Miss Murphy has been ruled eligible as a youthful offender; is that correct, Judge?

The Court: Yes. All right, Mr. Goldberger, are we ready to proceed? We are about to sentence Marcella Murphy.

Mr. Goldberger: May I proceed, Your Honor?

The Court: Just a moment. After due consideration, I find that Marcella Murphy is eligible to be treated as a youthful offender and, therefore, that her conviction be and the same is hereby vacated and replaced by a youthful offender finding. Now, in connection with that, is there something the District Attorney wishes to say relevant to the imposition of sentence on Marcella Murphy?

Miss Donovan: Yes, Your Honor. I feel that the facts elicited at the trial showing Marcella Murphy in possession of two lethal weapons, one of which was loaded with hollow point or dum-dum bullets, (798) would merit her being confined or incarcerated in an institution for youthful offenders.

Mr. Goldberger: May I be heard?

The Court: Yes.

Mr. Goldberger: I won't go through the facts of the trial, as Mr. Klein did, because this court knows full well the facts of the trial. I would like to bring this to the Court's attention: First of all, Miss Murphy was 16 at the time she was riding in that car with these three men. She is 17 years old now. She has never been in any trouble with the law prior to this, Your Honor.

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The whole theory—at least, my feeling is that the theory of American jurisprudence is that the young people, especially, deserve one bite at the apple in terms of getting involved with criminal law. This is Miss Murphy's bite. Now, the Court knows from the discussions that we had in terms of plea negotiations, and this court was more than considerate and more than fair in allowing us to try to negotiate a plea at the time, and we had some off-the-record discussions with the Court, and I think the Court knows full well that those two guns in Miss Murphy's (799) purse weren't Miss Murphy's guns. It is true she may have been carrying them for one or all three of the other gentlemen, but those weren't her guns; those two cannons.

Your Honor, I have had a number of conversations with her over the period of time I have represented her, and she certainly is the kind of a person, I think, personally—and I think my opinion may be important—the kind of a person that can make a go of society, get a decent job and live a decent and useful life without having to be incarcerated on the first time out with the criminal law.

I know the Court feels that those guns were not Miss Murphy's. I think that is the key factor. She may have been very foolish to be involved with the three men she was involved with at the time she was coming to New York, and to allow them to use her to hold any kind of weapon, and on the basis of the fact she has been found to be eligible as a Y. O., I would ask the Court to put her on probation.

I think the supervision of a probation is what she needs at this point in her life at 17 (800) years of age rather than some kind of an incarceration in an institution now, and I hope the Court will see fit to put her on probation.

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The Court: Is there something the defendant herself wishes to say at this time? Does the defendant wish to say anything?

Mr. Goldberger: No, she has nothing to say, Your Honor.

The Court: All right. I have received from the Probation Department a pre-sentence report, and, incidentally, the Probation Department recommends that this defendant receive consideration possibly as a probationer.

So, it is the sentence of this court that this defendant be sentenced to a sentence of five years of probation; that the terms of probation will be given to her in writing, signed by this court, and in addition to the mandated ones, the following terms: She must avoid injurious or vicious habits because the probation report indicates that she has some knowledge of marijuana and/or hard drugs; that she must refrain from frequenting unlawful or disreputable places or consorting with disreputable (S01) people, but that she must work faithfully at suitable employment or faithfully pursue a course of study or vocational training. Now, she is employed at the present time?

The Defendant: Yes.

The Court: Where do you work?

The Defendant: At Roadway Building; I am a clerk.

Mr. Goldberger: How much do you make?

The Defendant: \$87.

Mr. Goldberger: She makes \$87 a week as a clerk.

The Court: The next term is she must undergo available medical psychiatric treatment and remain in a specified institution when required for that purpose and also the drug conditions.

I want to tell you this, Marcella. You have received a break from the People of the State of New York when I decided to substitute a finding of youthful offender for your conviction. I am sure Mr. Goldberger may

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explain this to you later on, but the net result of that is that you have not been found guilty or been convicted of any crime in the (802) State of New York. So, if someone should ask you that later on—as a result of this problem—you can truthfully answer, "No, I have not been convicted of a crime."

The Defendant: Okay.

The Court: Now, you are going to receive the terms of probation. If you are in violation of any of these terms of probation, and that might require a hearing to determine whether or not you are, then the probation will be revoked, and if it is revoked, then the Court will impose a sentence, the same sentence it could have imposed today, namely, incarceration in a State correctional facility. Do you understand that?

The Defendant: Yes, Your Honor.

The Court: All right. The bail is exonerated.

Mr. Goldberger: Thank you very much, Judge.

The Court: Court is in recess.

(Whereupon, the proceedings in the above-entitled matter were recessed at 11:50 a.m. until 12:10 p.m.)

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Minutes of Sentencing.

(S03) The Court: All right, the defendant Melvin Lemmons is ready for sentencing under indictment 25-73. Will the defendant stand up, please? Is there something the District Attorney wishes to say relevant to the sentence?

Miss Donovan: Yes, Your Honor. I believe the facts of the case, as they were elicited before Your Honor on the trial, show that the defendant Melvin Lemmons was in possession of two lethal weapons.

The Court: He was found guilty of that by the jury.

Miss Donovan: And furthermore, the defendant's prior involvement with the law, as his criminal record would show, our office feels merits his incarceration in a State correctional institution.

The Court: Mr. Klein, is there something you wish to say relevant to the sentencing?

Mr. Klein: Yes, Your Honor, a few words. The charge and conviction here is of mere possession, constructive possession. The incident which occurred on the Thruway back in March of last year involved no force or violence. The facts, as presented in (S04) the trial, have been exposed, I think, fully in the motion which was made earlier today by myself to the Court.

I would not want to reiterate them, but I think under all of the circumstances, the alleged involvement of this defendant in the course of events which led to his conviction was at the very least considered to be a minimal one and on the most technical of grounds. I would ask the Court to take that into consideration because we have the situation where a car was stopped, supposedly the contraband of a very serious nature, normally and all too often resulting in violence. No violence here at any time. Every command given to this defendant he obeyed. He came from the car, came over to the police car: he submitted himself to a shaken-down search. He caused no disturbance. Nobody created any disturbance for the police at the time.

Minutes of Sentencing

Degrees of wrongdoing are the most important part that should enter into the sentencing, and we have here a family man, good family man, a man engaged in business in Detroit, Michigan, the haberdashery and clothing business, a man who owns (805) real property and other income-producing property in that community. I would ask the Court to take all of this into consideration and to be lenient, as lenient as the Court may be in this situation.

The Court: Is there something the defendant himself wishes to say at this time?

Defendant Lemmons: No, there isn't, Your Honor.

The Court: Well, contrary to what Mr. Klein may have indicated, this defendant does have a criminal record and at the present time is under sentence for a conviction obtained on February the 28th, 1974 and apparently is awaiting disposition of another charge in Wayne County.

Mr. Klein: May I rise and explain this?

The Court: You don't have to explain it.

Mr. Klein: Yes. That is—

The Court: You don't have to explain it.

Mr. Klein: A conviction is not final and decisive; there is an appeal pending.

The Court: Well, it is decisive to the extent he has been sentenced to 10 years in an institution. I find that rather decisive at this (806) point insofar as my consideration is concerned.

So, it is the judgment of this court on the third count of the indictment of which this defendant was found guilty, namely, possessing a dangerous weapon, a .45 automatic pistol, loaded with ammunition, that it is the judgment of this court that he be sentenced to an indeterminate sentence of imprisonment which shall have a maximum term of seven years.

I direct that the defendant be committed to the custody and control of the State Department of Correction

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Minutes of Sentencing

and delivered to Clinton State Prison, Clinton Correctional Facility at Dannemora, New York, there to be dealt with in accordance with the law.

Now, on the fourth count, possession of a .38 caliber revolver, loaded with ammunition, it is the judgment of this court that the defendant Melvin Lemmons be sentenced to an indeterminate sentence of imprisonment which shall have a maximum term of seven years.

It is again further ordered that the said defendant be committed to the custody of the State Department of Correction, to be delivered to Clinton (807) Correctional Facility at Dannemora, New York, there to be dealt with in accordance with the law. The defendant is remanded.

Mr. Klein: May it please the Court, are these sentences to run concurrently?

The Court: I am not aware that I have the power to direct this sentence run concurrently with the Federal sentence.

Mr. Goldberger: The two 7-year sentences.

The Court: I am sorry. The two 7-year sentences to run concurrently, yes.

(Whereupon, at 12:20 p.m., the proceedings in the above-entitled matter were concluded.)

. . .

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To be argued by:
J. JEFFREY WEISENFELD
Time: 25 minutes

Court of Appeals

State of New York

No
489

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

SAMUEL ALLEN, RAYMOND HARDRICH,
MELVIN LEMMONS and JANE DOE,

Defendants-Appellants.

Appellants' Brief

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Court of Appeals

State of New York

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

SAMUEL ALLEN, RAYMOND HARDRICH,
MELVIN LEMMONS and JANE DOE

Defendants-Appellants.

APPELLANTS' BRIEF

PRELIMINARY STATEMENT

In County Court, County of Ulster, appellants Melvin Lemmons, Raymond Hardrich, Samuel Allen and Jane Doe* were each convicted of two counts of possession of a gun as a felony. Subsequently the conviction of Doe was replaced by a youthful offender, adjudication.

On June 28, 1974, Hardrich and Allen were sentenced to seven years imprisonment on each count, said sentences to run concurrently (Mino, J.).

On August 22, 1974, Appellant Lemmons was sentenced to seven years imprisonment on such count; sentences to run concurrently. Appellant Doe was sentenced to probation (Mino, J.).

*Fictitious name.

Timely notices of appeal were filed on behalf of all the appellants and on July 2, 1975, the Appellate Division Third Department affirmed the judgment of conviction without a written opinion. Two justices concurring in part and dissenting in part in a written decision.

On August 6, 1975, Hon. Louis M. Greenblott, granted leave to appeal to the Court of Appeals and a timely notice of appeal was filed August 19, 1975.

ISSUES PRESENTED

1. Whether the motion to suppress should have been granted?
2. Whether the testimony of officer Askew supporting a finding of "plain view," was incredible as a matter of law?
3. Whether the evidence that two guns were found in the pocket book of appellant Doe was sufficient to sustain the conviction of the other appellants?
4. Whether the trial court's charge on reasonable doubt requires a new trial?

STATEMENT OF FACTS

Appellants, Samuel Allen, Raymond Hardrich, Melvin Lemmons and Jane Doe, were indicted for the crimes of Criminal possession of heroin, possession of a machine gun and two counts of possession of a weapon as felony.

The Hearing on the Motion to Suppress

On August 1, 1973, October 2, 1973 and November 9, 1973, a hearing on appellants' motion to suppress was held before Hon. Raymond J. Mino.

The Testimony

On March 28, 1973, Lemmons, Hardrich, Allen and Doe were driving in an automobile in the New York State Thruway. The

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car was stopped for a speeding violation (A17-18).^{*} After this stop, Trooper Emsing spoke to Lemmons and requested identification. Lemmons produced a valid driver's license and a valid registration in the name of his brother (A17, A407). He was informed that he was going to receive a traffic citation for speeding, and that he could pay the fine by mail (A18, A385). (A170).

At this time, Officer Emsing walked back to the patrol car to make out the ticket (A18). Officer Askew radioed in for a file check and received information to the effect that a Melvin Lemmons was wanted by the Detroit Police Department in connection with a weapons investigation (A19-20).

Trooper Askew testified, he then brought Lemmons to the patrol car and placed him under arrest. (A20-21). Doe and Hardrich testified that Askew motioned for Lemmons to come over to the police car (A387); Lemmons did so, and was handcuffed and placed in the car with Emsing (A21). Askew then returned to Lemmons' car, where he found a handgun in a pocketbook at Doe's feet.

Askew gave two different versions of how this crucial discovery took place. On direct examination, Askew stated that he saw the pocketbook, with the gun inside,¹ through the car window, and that he thereupon opened the door (A75). On cross-examination, however, Askew specifically adopted as true his testimony at the felony hearing (A152, 154). There, he stated that the only thing he saw before opening the door was "three heads and three shoulders" (A151), and that the pocketbook was exposed to view by his having opened the door (A153).

The remaining three appellants were then placed under arrest.

^{*}References are to appellants' appendix.

1. The Court took notice that the pocketbook, even when unzipped remains closed. (A-394).

A further search of the pocketbook at the scene uncovered a second gun. The appellants and the car were taken to the trooper's barracks at Kingston. Approximately two hours after the initial stop, the locked trunk of Lemmons' vehicle was broken into and a quantity of heroin and a third gun was discovered.

The Trial

On May 8, to May 14, 1974, a jury trial was held before Hon. Raymond J. Mino.

All the appellants were acquitted on the charges of possession of heroin and possession of a machine gun.

All the appellants were convicted of two counts of possession of a weapon. The only pertinent facts are those which relate to those weapons.

The Testimony

All four appellants were driving in an automobile on the New York State Thruway (A172). The automobile was stopped for a speeding violation (A169). The driver of the automobile, Lemmons, was arrested on the basis of an alleged Michigan warrant (A190).

After the arrest of Lemmons, Officer Askew returned to Lemmons vehicle (A192). Lemmons had been driving. Doe was in the front passenger's seat, and Allen and Hardrich were in the rear (A192). As he approached the car, Askew walked around the front of the vehicle to the passenger's side (A192). He testified that he saw a pocketbook lying on the floor of the front seat between Doe and the door (A192, 213, 204-205). This pocketbook was seized and it was discovered to contain two guns. The pocketbook contained documents relating to Doe and when asked if the pocketbook were hers, she admitted that it was (A-205). These guns formed the basis of the conviction of appellants.

After the People's case, defense counsel moved to dismiss the charges; specifically, it was pointed out that the weapons in question were found "upon the person" of Doe and for this reason, the statutory presumption under Section 265.16 P.L. did not apply. The motion was denied.

At the end of the entire case, the Court charged the jury as follows:

"Our Penal Law also provides that the presence in an automobile of any machine gun or of any handgun or firearm which is loaded is presumptive evidence of their unlawful possession.

In other words, these presumptions or this latter presumption upon proof of the presence of the machine gun and the hand weapons, you may infer and draw a conclusion that such prohibited weapon was possessed by each of the defendants who occupied the automobile at the time when such instruments were found. The presumption or presumptions is effective only so long as there is no substantial evidence contradicting the conclusion flowing from the presumption, and the presumption is said to disappear when such contradictory evidence is adduced.

To prove their accusations beyond a reasonable doubt, the People here introduced evidence—and I am going to very briefly outline it—to establish the stopping of the automobile on the Thruway; that the automobile was occupied by the four defendants at the time the automobile was stopped; that two concealable weapons or handguns were found in the purse of one of the defendants which was either on the front seat or on the floor in the front of the automobile; and that thereafter a search of the trunk disclosed a machine gun and the heroin." (A362-363)

Appellants Lemmons, Hardrich and Allen moved to have the verdict set aside on the ground of insufficient evidence. This motion was denied.

A88

ARGUMENT
POINT I

THE APPELLANTS' MOTION TO SUPPRESS THE
WEAPONS SHOULD HAVE BEEN GRANTED

*A. The Search of the Automobile Cannot be Sustained as
Incident to a Speeding Violation.*

The Supreme Court of the United States in *United States v. Robinson*, 414 U.S. 218 (1973) and *Gustafson v. Florida*, 414 U.S. 260 (1973), held that an arrest for a traffic infraction may support a full search incident to that arrest.² Lemmons was never formally arrested for speeding; the stop of his car, however, might be construed as an arrest. At the time of the stop speeding was a traffic infraction. §1180 V.T.L.

Robinson and *Gustafson* are not applicable here. Here, there was no "custodial arrest" nor even an intimation of an intent to make a "custodial arrest" on the basis of a speeding ticket. The Supreme Court's holding is quite clear: Where there is a right to arrest for a traffic infraction and where the particular police officer makes a "custodial arrest" he may search incident to that arrest. The main reason for permitting this search after a traffic arrest is to protect the officer.³

The justification or reason for the authority to search incident to a lawful arrest *rests quite as much on the*

2. While there is still some area of debate, the latest cases in the Court of Appeals indicate that *Gustafson* and *Robinson* are now the law of New York. *People v. Weintraub*, 35 N.Y.2d 351, 1974; *People v. Troiano*, 35 N.Y.2d 476, 1974.

3. Since there is no evidence of a speeding violation which can be seized. This Court would characterize the rationale of the search somewhat differently from the Supreme Court, namely, that the greater intrusion of custody included the lesser intrusion of an incidental search. Under either approach an intent to take or an actual taking into custody is required. *People v. Perel*, 34 NY 2d 463 (1974).

need to disarm the suspect in order to take him into custody . . . 414 U.S. at 234 (emphasis supplied)

Here, there was no taking of, nor intent to take Lemmons into custody on a speeding ticket (A170). The reason underlying the rule set out by the Supreme Court is absent. The stop for speeding cannot justify this search.⁴

B. The Arrest of Lemmons on the Basis of the Radio Information was Invalid.

The event from which everything else flowed was the arrest of Lemmons. This arrest was predicated on information received over the radio to the effect that Lemmons was wanted in Michigan in connection with a weapons investigation. Other than this information, there were no factors upon which to base a finding of probable cause. The trial court found that the police had the right to rely on the information about the warrant. Below, the district attorney relied on the fact that information supplied by radio can supply probable cause. Appellants do not dispute that it can. Radio information is no different from information from any other sources;⁵ depending on its content, it may or may not amount to probable cause. The critical question here is not the manner of the communication, but the weight and sufficiency of the information received: Does it constitute probable cause and sustain the arrest?

The general proposition is that radio information can, in certain situations, supply probable cause. Thus, in *United States v. McDowell*, 475 2d 1037 (9th Cir. 1973) a radio dispatch was received reporting a crime in progress and detailing a description of the perpetrators. The court held that the transmitted in-

4. Quite properly, neither the Court below, nor the District Attorney relied on the speeding ticket as a basis for the search.

5. Since this information comes through official police channels it has been treated as reliable. See *United States v. McDowell*, 475 F. 2d 1037 (9th Cir., 1973). Of course this does not answer the question of the sufficiency of the information.

formation, in the totality of the circumstances, legitimately contributed to probable cause. In *People v. Baer*, 37 AD 2d 150 (3d Dept. 1971) the radio information contained a detailed description of the alleged perpetrator and did not merely allege that there was a warrant. See Cases and Points, Appellate Division 37 A.D. 2d Volume 9. Neither these cases, nor *Burton v. New York*, *Central & Hudson Railroad*, 132 N.Y.S. 628, aff'd 210 N.Y. 568 (1911), nor any other case discovered by appellants approves or even intimates the blanket rule that radio bulletins are, by that fact alone, sufficient to validate the actions of responding police officers. See *United States v. King*, 472 F.2d 1 (9th Cir., 1973), cert. den. 414 U.S. 864.

In fact, such a rule would be unconstitutional. The Supreme Court of the United States, in *Whiteley v. Warden*, 401 U.S. 560 (1971), invalidated a search predicated upon a radio report that there was a warrant for the arrest of defendant. The Court stated that the underlying validity of the warrant was the key to its finding. Since the warrant was invalid, broadcasting it did not add to its validity.⁶ The Court specifically rejected the argument that the search was reasonable because the arresting officers had a right to rely upon information sent by another policeman.

We do not, of course, question that the Laramie police were entitled to act on the strength of the radio bulletin. Certainly, police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting an aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely

6. Also, *United States v. Impson*, 482 F2d 197, 199 (5th Cir. 1973) cert. den. 414 US 1096; *U.S. v. Averett*, 477 F2d 1009, 1012-1013 (6th Cir. 1973) cert. den. 414 U.S. 851; *U.S. v. Wilson*, 479 F2d 937, 939 (7th Cir. 1973).

on fellow officers to make the arrest. 401 U.S. at 568.⁷

This is virtually the situation here.⁸ The police were supplied with information that there was a weapons investigation involving Lemmons. That information was incorrect; in fact, there was neither a valid warrant nor any investigation then in progress.⁹ (A93) As stated in *United States v. Cox*, 475 F.2d 837 (9th Cir., 1973);

7. Some cases have seized upon the language in the first sentence quoted above to find that a stop is valid under *Whiteley*, even where an arrest and search are not. e.g. *People v. Dellorjano*, 352 N.Y.S.2d 963, 970 (Co. Ct. Stuff. Co. 1974).

These cases misapply *Whiteley*. *Whiteley*, stands for the proposition that information gains no weight by being broadcast. While those who receive such information must act, the ultimate validity of their actions depends entirely upon the nature of the information relied upon to send the message. If that information, when broadcast, could sustain an arrest, then an arrest made in reliance upon it is valid. The same is so for a stop. Ringel, *Searches, Seizures, Arrests & Confessions*. Clark Boardman, Ltd., 1972, 1974 Supplement §270, p. 139. Here, the People offered no testimony as to the underlying basis of the warrant. *U.S. v. Impson*, supra at 199. Moreover, the warrant no longer existed. No action would have been justified by the source of the information and the police at the scene can have no greater right. Any other holding would lead to serious abuse. The police could send a radio report based on nothing and hope that when stopped, the suspect would be found with contraband, etc., in "plain view" or that he might do something to justify further action. When the Court in *Whiteley* stated that the Laramie police were entitled to act it removed any stigma from their actions, it did not validate them for Fourth Amendment purposes.

8. *Whiteley* presented a stronger case for upholding the search in two respects. First, the information received by the police officers concerned a crime recently committed; their arrest of the subject was analogous to hot pursuit. Second, the dissent observes that the facts, independent of the purported warrant, may have been enough for probable cause. Still, the Court held that a search was not proper. Here, of course, there was neither hot pursuit, nor probable cause.

9. The record of the hearing is unclear as to the precise terms of the information received over the radio. At page A73, Officer Askew testified that "after receipt of an active File 5 that the subject was wanted in connection with an investigation with a police department in Detroit, Michigan," he was placed under arrest. See also, A74. However, Askew agreed that the radio report concerned a fugitive warrant. See also A105. No proof was offered as to the existence of a valid warrant at the time of arrest; the burden was on the People

A90

Thus in good faith officers can search without a warrant a wrong man incident to a warrantless arrest, yet in good faith officers cannot arrest the right man if the warrant is invalid. 475 F.2d at 840.

See also, *United States ex rel. Mealey v. Delaware*, 352 F. Supp. 349 (D.C. Del., 1972), where the case was remanded to the State Court to determine if there was a valid warrant to justify the search.

The rationale underlying *Whiteley* was adopted by the Court of Appeals in *People v. Horowitz*:

The question was argued in *People v. Vetrano*, (20 N.Y.2d 698) whether an arrest could be made by the police of the City of White Plains merely on the say so of the Police Department of the City of Yonkers where the crime was committed. The question was not decided, as the memorandum of affirmance shows, inasmuch as it appeared that the account of the attempted robbery in Yonkers was supplied to the Yonkers Police Department by the victim himself.

The controlling principle seems to be that *it is not necessary for the officer making the arrest to know of the reliability of the informer or to be, himself, in possession of information sufficient to constitute probable cause provided that he acts upon the direction of or as a result of communication with a superior or brother officer or another police department provided that the police as a whole were in possession of information sufficient to constitute probable cause to make the arrest.*

This record does not show that any of the law enforcement officers had any basis for the arrest. *People v. Berrios*, 28 N.Y. 2d 361 (1971); *U.S. v. Impson*, *supra*. Since information about an "investigation" cannot possibly be a stronger predicate for probable cause than information about an outstanding warrant, this brief will treat the radio information, for *Whiteley* purposes, as actually specifying that a warrant existed.

forcement officers had facts before them sufficient to indicate that this anonymous informer was reliable, or that the police had other information, not derived from the informer, which was sufficient, in itself, to constitute probable cause. 21 N.Y.2d at 60 (1967) (emphasis supplied)

People v. Smith, 31 A.D. 2d 864 (3d Dept., 1969); *United States v. Canieso*, 470 F.2d 1224, 1230 ftnt. 7 (2d Cir., 1974); *People v. Lypka* 36 N.Y.2d 210 (1975); *People v. Blanks*, 35 N.Y. 2d 942 (1974).

The most recent pronouncement on the subject by this Court, *People v. Lypka*, 36 N.Y.2d 210 (1975) makes it clear that the rule of *Whiteley* is the law of New York.

In this case, no law enforcement officer had sufficient information to constitute probable cause to arrest or search Lemmons, because no such probable cause existed. Nor did any law enforcement officer have information sufficient to constitute reasonable suspicion to justify a stop.

The trial court erroneously relied upon *People v. La Belle*, 37 A.D.2d 135 (3d Dept., 1971). *La Belle* correctly held that where a warrant is invalid, an arrest may still be proper if the arresting officers have probable cause.

That warrant was invalid, a fact unknown to the arresting officers . . . Nevertheless, the arrest was lawful because made upon probable cause held by the arresting officers. *Id.* at 137 (emphasis supplied)

Here the warrant was invalid and the arresting officers had no information other than the warrant upon which to rely. If pertinent at all, *La Belle* supports appellants' position.

It is absolutely clear that the arrest of Lemmons was invalid under *Whiteley* and *Horowitz*, and the seizures flowing from it are fruits of the poisonous tree. *Silverthorn Lumber Co. v. United States*, 251 U.S. 385 (1914); *Nardone v. United States*, 308 U.S. 338 (1939). This evidence must be suppressed.

A 91

C. The Arrest of Lemmons on the Theory that he was a Fugitive was Invalid.

In *Whiteley v. Warden*, 401 U.S. 560 (1971), the United States Supreme Court stated:

*** the State argues that a reviewing court should employ less stringent standards for reviewing a police officer's assessment of probable cause as a prelude to a warrantless arrest than the court would employ in reviewing a magistrate's assessment as a prelude to issuing an arrest or search warrant. That proposition has been consistently rejected by this Court. *United States v. Ventresca*, 380 U.S. at 105-109; *Anguilar v. Texas*, 378 U.S. at 110-111; *Jones v. United States*, 362 U.S. at 270-271. And the reason for its rejection is both fundamental and obvious: less stringent standards for reviewing the officer's discretion in effecting a warrantless arrest and search would discourage resort to the procedures for obtaining a warrant. Thus the standards applicable to the factual basis supporting the officer's probable cause assessment at the time of the challenged arrest and search are at least as stringent as the standard applied with respect to the magistrate's assessment. See *McCray v. Illinois*, 336 U.S. 300, 304-305 (1967)¹⁰ (emphasis supplied)

Therefore, those cases dealing with the standards for obtaining a fugitive warrant are applicable here.

The Courts of this state have recognized the requirement of probable cause in such cases. *People v. Artis*, 32 A.D.2d 554 (2d Dept., 1969).

However, developments in constitutional law since

¹⁰. The Supreme Court has gone so far as to suggest that in a close case a search with a warrant may be sustained where without it the search would fail. *Jones v. United States*, 362 U.S. 257, 270. (1960).

Wolf [supra] and *Mapp* [supra] have made the requirement of probable cause in "in-state" cases equally applicable to a warrant of arrest in an extradition case (*Kirkland v. Preston*, 385 F. 2d 670; cf. *Giordenello v. United States*, 357 U.S. 480; See *Ker v. California*, 347 U.S. 23, 24; *Beck v. Ohio*, 379 US 89). 32 A.D. 2d at 555.

The Appellate Division by its ruling was not being benevolent to fugitives; the holding simply reflected constitutional mandates. *People ex rel. Miller v. Krueger*, 35 A.D. 2d 743 (2d Dept., 1970); *People ex rel. Porzo v. Wright*, 59 Misc. 2s 1056; (Co. Ct. West. Co. 1969). *People ex rel. Gatto v. District Attorney Richmond Co.*, 32 A.D. 2d 1053 (2d Dept., 1969).

It is necessary, therefore, to read the provisions of the Criminal Procedure Law within the framework of *Whiteley* and *Artis*. Clearly, Section 570.08 contemplates the existence of probable cause as a condition precedent to the issuance of a warrant.¹¹ An interpretation of Sections 570.32 and 570.34 at odds with this would render the statutory scheme unconstitutional, since, fundamentally, there can be no arrest of a person on less than probable cause. *United States v. Ventresca*, 380 U.S. at 105-109.

There was, in short, no more cause to arrest Lemmons as a fugitive than there was to arrest him on the underlying weapons charge. Relabeling this arrest cannot make it valid.

D. The Plain View Doctrine Is Inapplicable of this Case.

It is crucial to the resolution of this appeal whether Trooper Askew saw a gun in plain view. Necessary to this finding are two separate determinations: Whether Askew saw anything inside the car before he opened the door and whether what he saw was

¹¹ The demand for extradition must be accompanied by authenticated copies of an indictment or information or supporting affidavits together with the warrants issued.

incriminating. Appellants below had the burden of establishing, by a preponderance of the evidence, that their version of what happened was correct. They sustained that burden.

An accurate evaluation of the conflicts posed by the testimony requires some assessment of the context in which the search occurred. Here, the critical fact which gave color to everything happening thereafter, was the arrest of Lemmons on a weapons warrant. Prior to approaching Lemmons' car, Officer Askew had handcuffed Lemmons and placed him in the patrol car. He returned to the Chevrolet armed with the belief that he had made a valid arrest of a dangerous man; the very nature of the charge against the prisoner supported that belief. As he stated at the hearing, he was going over to Lemmons' car and the three passengers inside to "continue the arrest."¹²

Officer Askew gave two different versions of what happened when he reached the passenger window of Lemmons' car. On direct examination, Askew testified that he saw the pocketbook, with a gun inside, through the window, and that he then opened the car door (a75). On cross-examination, however, Askew adopted as true the following answers given during the felony hearing:

Q. When you walked around to the side where the passenger was located, you opened the door of the car

A. Correct.

Q. By opening the door of the car you saw you exposed something to your view, did you not?

A. That's correct.

Q. And what did you say you exposed to your view? How did you describe it? As a purse?

A. Correct. (A122, 147)

Askew then attempted to repair the contradiction by implying that these answers did not exclude the possibility of his having seen the purse initially before opening the door.

¹². Appendix A-116. The district attorney's memorandum submitted below, at page 2, confirms that this was Officer Askew's intention.

Q. And you did not testify before Mr. Justice DeMond that you looked into this car or saw anything in this car prior to opening the door of that car; isn't that a fact?

A. No one asked me, that's correct.

Q. Pardon?

A. No one asked me, that's correct.

Q. That's your contention, that no one asked you that?

A. Correct. (A147-148)

But in fact, Askew was asked about any "initial" observations, and he gave a clear, unequivocal answer:

Q. What did you see when you looked in the car before you opened the door?

A. Three heads and three shoulders.

Q. Of people?

A. That's correct.

Q. And that is all?

A. That's all.

Q. That's all you saw other than the usual interior of the car?

A. Correct. (A151-152)

It is apparent that the version of the facts which Askew first recounted at the motion to suppress is an effort to salvage an invalid search.¹³

It is obvious that the pocketbook, if it was visible at all from outside the car, could only have been seen with a great deal of concentrated peering.¹⁴ Certainly, this experienced police

13. The district attorney's memorandum of law submitted below, was based upon the testimony at the preliminary hearing and conceded that the guns in the handbag were not seen until after the door was open. Point II of that memorandum is entitled: THE PROCESS WHEREBY THE OFFICER OPENED THE DOOR OF THE SUBJECT VEHICLE *THEREBY* ACQUIRING "OPEN VIEW" OF THE .45 CALIBER HANDGUN WAS ENTIRELY LAWFUL (at page 2, emphasis supplied). Askew's testimony supports no other position. See A263-264 for Askew's testimony before the grand jury to the same effect.

14. The car window was closed, and the pocketbook was at Murphy's feet "close to the passenger door" (minutes of the felony hearing, at 59).

officer, confronted with a situation of possible danger, did not pause to make the nice observations newly asserted at the hearing on the motion to suppress. In some circumstances the sighting of the purse through the car window might have occurred;¹⁵ here, it is apparent that it did not.

Nor does the improbability end here. In order to apply the plain view doctrine to the finding of the gun, it is necessary to hold that Officer Askew saw the weapon in the pocketbook. This is incredible.

First, it is beyond belief that Doe would have left her pocketbook open, gun exposed, during the time between the arrest of Lemmons and the approach of Askew. The possibility that a police officer would open the car door and see the weapon was hardly remote; and there was ample time in which to secrete the entire pocketbook, let alone zip it shut. The Appellants Doe's testimony that, in fact, it was shut during the entire incident (B6) is completely credible.

Second, even if the pocketbook was visible, was actually seen and was unzipped, a gun therein would still not have been "in plain view". The court below impliedly found that "this pocketbook when unzipped closes by the nature of the purse itself; it doesn't remain open" (A-394). This is flatly contradictory to Askew's assertion that the pocketbook was open and that the gun was visible in the interior.

The clear weight of the evidence supports the testimony of appellants that the pocketbook was closed, that Askew ordered all three occupants out of the car, and that only then did he open the purse and expose the gun inside.

Appellants do not challenge the sensibility of the "plain view" doctrine in situations where it truly applies to the facts. But testimony such as that of Officer Askew impairs the viability of this and other recognized principles of law. The ease with which

15. In his testimony before the grand jury, Askew testified that the gun was on the seat and not the floor (A263-264).

any constitutional rule can be satisfied by skillfully devised testimony mandates that what is unbelievable be disbelieved. However his motivation is viewed, Officer Askew's testimony should not be allowed to sustain the search.

It is well settled, of course, that issues of credibility are primarily for the trial court and its determination is entitled to great weight (*People v. Atlas*, 183 App. Div. 595, 600, 170 N.Y.S. 834, 837, affd 230 N.Y. 629, 130 N.E. 921). However, reversal is warranted where the fact findings of the trial court are manifestly erroneous or so plainly unjustified by the evidence that the interests of justice necessitate their nullification (5A C.J.S. Appeal and Error Section 1656[3]). We refuse to credit testimony which has all appearances of having been patently tailored to nullify constitutional objections. In evaluating testimony we should not discard common sense and common knowledge. This concept is well stated in section 649 of 22 N.Y. Jurisprudence, Evidence, as follows:

"The rule is that testimony which is incredible and unbelievable, that is, impossible of belief because it is manifestly untrue, physically impossible, contrary to experience, or self-contradictory, is to be disregarded as being without evidentiary value, even though it is not contradicted by other testimony or evidence introduced in the case." *People v. Garafolo*, 44 A.D.2d 86 at 88. (2d Dept. 1974)

See also, *People v. McCormick*, 39 A.D.2d 590 (2d Dept. 1972).

Appellants are aware of the restrictions imposed upon this Court by Article 6 §3 of the N.Y. State Constitution, limiting jurisdiction to questions of law. *People v. Maney*, 37 N.Y. 2d 229 (1975). However, appellants contend that the facts this case point so clearly to fabrication on the part of officer Askew that the issue is one of law. Here, the version given by Askew at the

preliminary felony hearing would require suppression. At the felony hearing the legality of the search was not at issue. At the suppression hearing, where the point of first observation became critical, Askew's testimony was altered to avoid constitutional problems. In light of the change in testimony and the other inherent improbabilities present, the testimony of Askew is incredible as a matter of law.

While this court does not sit as in *nisi pruis* to appraise contradictory fact questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to its reasonableness the fundamental—i.e. constitutional—criteria established by this Court have been respected. *Ker v. California*, 374 U.S. 23, 34 (1963).

If the exclusionary rule is to be abolished, it should be done by the Courts, and not by the creative testimony of police officers.

POINT II

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTION OF LEMMONS, HARDRICH AND ALLEN

The only evidence in this case pertaining to the charge for which defendant Lemmons, Hardrich and Allen were convicted was that two guns were found in defendant Doe's pocketbook. This pocketbook was found on the floor of the car near where Doe had been sitting.

Under these circumstances, the conviction of Lemmons, Hardrich and Allen for possession of these weapons cannot stand.

First, under the very terms of the statute Section 265.16 P.L.,

no presumption can arise where the weapon is found on the person of a particular party. Here, the possession of the guns can only be attributed by Doe. These weapons were found in her pocketbook. A woman's pocketbook is clearly on her person and numerous cases have, in analogous circumstances, so held. For example, in *People v. Pugach*, 15 N.Y. 2d 65 (1964), cert. denied 380 U.S. 936, the Court of Appeals upheld the "frisk" of defendant's brief case even after it had been taken from defendant and was in possession of a police officer. The Court stated:

The fact that the loaded gun was found concealed in the brief case, rather than in a pocket of defendant's clothing, affords no grounds for saying that this "frisk" was in reality a constitutionally protected search. The loaded firearm concealed in the brief case carried in the hands of the defendant was in the language of the statute "concealed upon his person" (Penal Law Section 1897). *Id.* at 69.16

People v. Moore, 32 N.Y.2d 67, 71 (1973) ("frisk" of defendant's handbag permitted). See *People v. Bowles*, 29 A.D. 2d 996 (3d Dept., 1968) ("frisk" of defendant's trousers which were on the floor of defendant's room).

It is clear, that contraband contained in the handbag of one of the passengers of an automobile is contraband "concealed upon the person" of that occupant and that occupant alone. The mere fact that at the time of the discovery and seizure Doe was not physically holding her bag is not significant.

In *Pugach*, the discovery was made after the police had custody of the brief case. In *Moore*, the same is so of the handbag, and in *Bowles*, the same is true of the trousers. *People v. Davis*, 52 Misc. 2d 184, 185 (Sup. Ct., Queens Co. 1966); *People v. Desthers*, 343 N.Y.2d 887 (Crim. Ct., City of N.Y., N.Y. Co. 1973); *People v. Garcia*, 41 A.D. 2d 560 (2d Dept. 1973); *People*

16. Section 1897 is the predecessor to Section 265 P.L.

v. *Rivera*, N.Y.L.J. 9/18/74 p. 17 Col. 6 (Special Narcotics Court, N.Y.C., 1974).

Doe was the only woman in the automobile, the pocketbook was seen between her leg and the door immediately prior to the seizure. When questioned Doe admitted ownership. Moreover, there were documents in the purse which indicated Doe's ownership. Under these circumstances the presumption set out in Section 265.15 cannot arise as to Lemmons, Hardrich and Allen.

Second, if the presumption is applicable here, then it is unconstitutional as applied.

In *Leary v. United States*, 395 U.S. 6 (1969), the Supreme Court held that a presumption must be regarded as "irrational" or "arbitrary", and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proven fact upon which it is made to depend. *Id.* at 36.

The New York test has been held to conform to that set out in *Leary*; though the actual language is somewhat different (i.e., "based on life and life's experiences", there is a "fair", "natural" and "rational" connection between the fact proved and the fact to be presumed or inferred). *People v. McCaleb*, N.Y.2d 394, 400-401 (1969); *People v. Terra*, 303 N.Y. 332, 335 (1951) app. Dism'd 342 U.S. 938; *People v. Reisman*, 29 N.Y.2d 278, 286 (1971).

Assuming that the presumption is constitutional on its face, *People v. De Leon*, 32 N.Y.2d 944 (1973), it is clearly unconstitutional as applied. There can be no "substantial assurance" that a defendant in a car is more likely than not to know what is on the person of other occupants of the car.¹⁷ *State v. Lewis*, 225 A.D.2d 582, 584 (Superior Ct., of New Jersey, App. Div., 1966). In the practice commentary to Section 220.25

¹⁷ Even though, technically, the belongings of those in the car are "contents" of the car.

(dealing with possession of drugs in an automobile) Messrs. Denzer and McQuillan state:

While thus broadening the automobile presumption in one respect, the revised section narrows it in another with the logical limitation that it does not apply where "the drug is concealed upon the person of one of the occupants" (cf. former Penal Law Section 1751 (4)). *In that situation, no sound basis exists for presuming possession by any of the other occupants*; yet in the absence of the indicated proviso, the former provision was rigidly construed as not allowing of any exception in such cases (*People v. Potter*, 1956, 4 Misc. 2d 796, 162 N.Y.S. 2d 439). Apart from the inherent injustice of that proposition, it was inconsistent with a similar provision of the former Penal Law dealing with weapons found in automobiles, which expressly excluded such cases from the scope of the presumption (Section 1899 (3a) (Emphasis supplied).

no construction
made only
because the
law is not clear
and it is not
clear
whether the
presumption
applies.

See, also, Revised Penal Law Section 265.15 (3)(a).

Without resort to the presumption, the evidence is totally insufficient to sustain the conviction. *People v. Di Landri*, 250 App. Div. 52 (1st Dept., 1937)

It cannot be held with any degree of certainty that the revolver which was found on the floor of the car belonged to the defendant or was in his constructive possession rather than in the possession of one of the other occupants of the car. The defendant's guilt, therefore, was not established beyond a reasonable doubt. *Id* at 52.

People ex re. De Feo v. Warden of City Prison, 136 Misc. 836 (Sup. Ct., Kings Co., 1930) (and cases cited therein); *People v. Rivera*, N.Y.L.J. 9/18/74 p. 17 col. 6 (Spec. Narc. Ct., NY Co., 1974).

In fact, the statutory presumption was enacted in 1936 to meet this difficulty. *People v. Rogan*, 94 N.Y.S. 2d 681, 683 (Sup. Ct., Kings Co., 1949).

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Or as the Appellate Division, First Department stated:

Before enactment of Section 1898-a of the Penal Law (now superseded by Penal Law, Sections 1899, 1900),¹⁸ mere presence in an automobile of a pistol and several persons was insufficient to establish constructive possession of the pistol by any of the persons. *People v. Anthony*, 21 A.D. 2d 666 (1st Dept., 1964).

In conclusion, it is apparent that the statutory presumption set out in Section 265.15 cannot apply to Lemmons, Allen or Hardrich. This is so both statutorily and constitutionally. Without this presumption there can be no legal conviction of Lemmons, Hardrich or Allen. Even if there had been evidence outside the presumption to sustain the conviction,¹⁹ the conviction still cannot be sustained. The Court charged the jury on the presumption and Lemmons, Hardrich and Allen are entitled, at the very least, to a new trial.

POINT III

THE COURT'S CHARGE ON REASONABLE DOUBT REQUIRES A NEW TRIAL

In its charge to the Jury on the definition of "reasonable doubt" the Court stated:

That simply means that if a Jury entertains a doubt as to the guilt of defendant, it *must* be such a doubt for which *the juror could give a reasonable explanation* if he were requested to do so. (T736) (emphasis supplied)

This charge was improper. The Court defined reasonable doubt in terms of the ability of a juror to articulate the basis of that doubt.

¹⁸. Now superseded by Section 265.15 P.L.

¹⁹. An example of this would be if Appellants' fingerprints had been found on these guns. The presumption would not apply but there would still be evidence of possession.

A juror may very well hold a reasonable doubt and yet not be able to express himself clearly or cogently if required to do so. To define reasonable doubt in this fashion is to create a standard which varies depending on the debating abilities of jurors. This is not permissible²⁰ and a new trial is required.

CONCLUSION

**THE JUDGMENT OF CONVICTION SHOULD BE
REVERSED AND THE INDICTMENT DISMISSED
OR IN THE ALTERNATIVE APPELLANTS
SHOULD BE GRANTED A NEW TRIAL.**

Respectfully submitted,

GOLDBERGER, FELDMAN & BREITBART
Attorneys for Defendants-Appellants

20. *Contra, People v. Ales*. 220 App. Div. 743 (2d Dept., 1927); *Dowsey Charges to the Jury and Requests to Charge in a Criminal Case in New York*. Part I, Form #11 p. 3-10 (1968).

STATEMENT PURSUANT TO RULE CPLR 5531

1. The indictment number in the court below was 25/74.
2. The full names of the original parties were Pv. Melvin Lemmons, Raymond Hardrich, Samuel Allen, Jane Doe.
3. This action was commenced in County Court, Ulster County.
4. This action was commenced by the filing of an indictment.
5. This appeal is from a judgment of conviction convicting each appellant of two counts of possession of a weapon as a felony, and from an order of the Appellate Division Third Department affirming said judgments of conviction.
6. This appeal is from a judgment rendered on June 28, 1974 (Appellants Hardrich and Allen) and August 22, 1974 (Lemmons and Murphy) (Mino, J.) and affirmed by the Appellate Division, Third Department on July 2, 1975.
7. This appeal is being prosecuted with the appendix method.

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**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION — THIRD DEPARTMENT**

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

SAMUEL ALLEN, RAYMOND HARDRICH,
MELVIN LEMMONS and MARCELLA MURPHY,

Defendants-Appellants

PRELIMINARY STATEMENT

In County Court, County of Ulster, appellants Melvin Lemmons, Raymond Hardrich, Samuel Allen and Marcella Murphy were each convicted of two counts of possession of a gun as a felony.

On June 28, 1974, Defendants Hardrich and Allen were sentenced to seven years imprisonment on each count, said sentences to run concurrently (Mino, J.).

On August 22, 1974, Appellant Lemmons was sentenced to seven years imprisonment on such count; sentences to run concurrently. Appellant Murphy was sentenced to probation (Mino, J.).

Timely notices of appeal were filed on behalf of all the appellants.

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STATEMENT OF FACTS

Appellants, SAMUEL ALLEN, RAYMOND HARDRICH, MELVIN LEMMONS and MACELLA MURPHY, were indicted for the crimes of Criminal possession of heroin, possession of a machine gun and two counts of possession of a weapon as felony.

The Hearing on the Motion to Suppress

On August 1, 1973, October 2, 1973 and November 9, 1973, a hearing on appellants' motion to suppress was held before Hon. Raymond J. Mino.

On March 28, 1973, LEMMONS, HARDRICH, ALLEN AND MURPHY were driving in an automobile on the New York State Thruway. The car was stopped for a speeding violation (A5-6)*. After this stop, Trooper Emsing spoke to Lemmons and requested identification. Lemmons produced a valid driver's license and a valid registration in the name of his brother (A6, C30). He was informed that he was going to receive a traffic citation for speeding, and that he could pay the fine by mail (A7, C8) (T165)**.

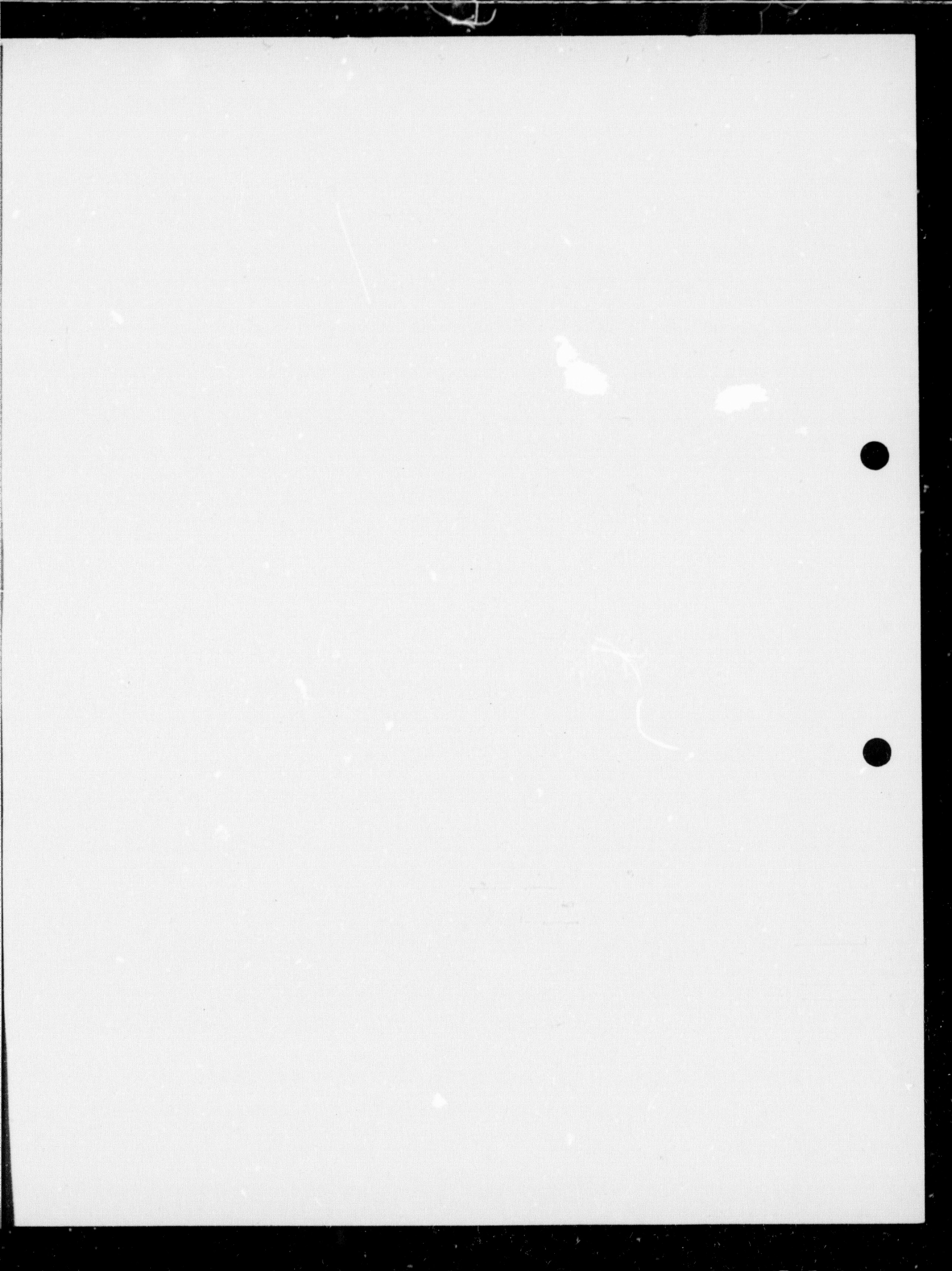
At this time, Officer Emsing walked back to the patrol car to make out the ticket (A7). Officer Askew radioed in for a file check and received information to the effect that a Melvin Lemmons was wanted by the Detroit Police Department in connection with a weapons investigation (A8-9).

At this point, Trooper Askew testified, he brought

* References are to the minutes of the hearing on the motion to suppress. The minutes of August 1, 1973, are designated "A", those of October 2, 1973 as "B"; those of November 9, 1973 as "C".

**References are to the minutes of trial which are designated "T".

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All the appellants were convicted of two counts of possession of a weapon. The only pertinent facts are those which relate to those weapons.

All four appellants were driving in an automobile on the New York State Thruway (T167). The automobile was stopped for a speeding violation (T164). The driver of the automobile, Lemmons, was arrested on the basis of an alleged Michigan warrant (T185).

After the arrest of Lemmons, Officer Askew returned to Lemmons vehicle (T187). Lemmons had been driving. Murphy was in the front passenger's seat, and Allen and Hardrich were in the rear (T187). As he approached the car, Askew walked around the front of the vehicle to the passenger's side (T187). He testified that he saw a pocketbook lying on the floor of the front seat between Murphy and the door (T187, T208, T209-210). This pocketbook was seized and it was discovered to contain two guns. The pocketbook contained documents relating to Murphy and when asked if the pocketbook were hers, she admitted that it was (T200). These guns formed the basis of the conviction of appellants.

After the People's case, defense counsel moved to dismiss the charges; specifically, it was pointed out that the weapons in question were found "upon the person" of Murphy and for this reason, the statutory presumption under Section 265.16 P.L. did not apply (T159). The motion was denied.

At the end of the entire case, the Court charged the jury as follows:

"Our Penal Law also provides that the presence in an automobile of any machine gun or of any

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handgun or firearm which is loaded is presumptive evidence of their unlawful possession.

In other words, these presumptions or this latter presumption upon proof of the presence of the machine gun and the hand weapons, you may infer and draw a conclusion that such prohibited weapon was possessed by each of the defendants who occupied the automobile at the time when such instruments were found. The presumption or presumptions is effective only so long as there is no substantial evidence contradicting the conclusion flowing from the presumption, and the presumption is said to disappear when such contradictory evidence is adduced.

To prove their accusations beyond a reasonable doubt, the People here introduced evidence—and I am going to very briefly outline it—to establish the stopping of the automobile on the Thruway; that the automobile was occupied by the four defendants at the time the automobile was stopped; that two concealable weapons or handguns were found in the purse of one of the defendants which was either on the front seat or on the floor in the front of the automobile; and that thereafter a search of the trunk disclosed a machine gun and the heroin." (T. 743-744)

Appellants Lemmons, Hardrich and Allen moved to have the verdict set aside on the ground of insufficient evidence. This motion was denied.

A/03

ARGUMENT

POINT I

**THE APPELLANTS' MOTION TO SUPPRESS
THE WEAPONS SHOULD HAVE BEEN
GRANTED**

*A. The Search of the Automobile Cannot be Sustained as
Incident to a Speeding Violation.*

The law in this State is that an arrest for a traffic infraction² cannot sustain a search for weapons or for other evidence. *People v. Marsh*, 20 N.Y. 2d 98 (1967); *People v. Adams*, 32 N.Y. 2d 451 (1973).

The Supreme Court of the United States in *United States v. Robinson*, 414 U.S. 218 (1973) and *Gustafson v. Florida*, 414 U.S. 260 (1973), held that an arrest for a traffic infraction may support a full search incident to that arrest.

Robinson and *Gustafson* are not applicable here. Those New York Courts to which this question has been presented have rejected the application of *Robinson* and *Gustafson* in New York.³

Even more important is the fact that here there was no "custodial arrest" nor even an intimation of an intent to make a "custodial arrest" on the basis of the speeding

2. Lemmons was never formally arrested for speeding. The stop of car, however, might be construed as an arrest.

At the time of the arrest, speeding was a traffic infraction Section 1180 V.T.L.

3. *People v. Kelly*, 77 Misc. 2d 264 (Crim. Ct. Bx. Co. 1974); *People v. Copeland* 77 Misc. 2d 649 (D. Ct. Nassau Co. 1974), *People v. Farinuro*, N.Y.L.J. 3/18/74 P. 17 C. 6 (App. Term, 2d Dept.) But see, *People v. Weintraub*, 35 N.Y.2d 351, 353 (1974); *People v. Troiano*, - N.Y. 2d - (1974); N.Y.L.J. 12/26/74 P. 2 C.2.

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ticket. The Supreme Court's holding is quite clear: Where there is a right to arrest for a traffic infraction and where the particular police officer makes a "custodial arrest" he may search incident to that arrest. The whole reason for permitting this search after a traffic arrest is to protect the officer.⁴

The justification or reason for the authority to search incident to a lawful arrest *rests quite as much on the need to disarm the suspect in order to take him into custody* . . . 414 U.S. at 234 (emphasis supplied)

Here, there was no taking of, nor intent to take Lemmons into custody on the speeding ticket (T165). The reason underlying the rule set out by the Supreme Court is, therefore, absent. The stop for speeding cannot justify this search.⁵

B. The Arrest of Lemmons on the Basis of the Radio Information was Invalid.

The event from which everything else flowed was the arrest of Lemmons. This arrest was predicated on information received over the radio to the effect that Lemmons was wanted in Michigan in connection with a weapons investigation. Other than this information, there were no factors upon which to base a finding of probable cause. The Court below found that the police had the right to rely on the information about the warrant. Below, the district attorney relied on the fact that information supplied by radio can supply probable cause. Appellants do

4. There being no evidence to seize.

5. Quite properly, neither the Court below, nor the District Attorney relied on the speeding ticket as a basis for the search.

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not dispute that it can. Radio information is no different from information from any other sources,⁶ depending on its content, it may or may not amount to probable cause. The critical question here is not the manner of the communication, but the weight and sufficiency of the information received: Does it constitute probable cause and sustain the arrest?

The general proposition is that radio information can, in certain situations, supply probable cause. Thus, in *United States v. McDowell*, 475 2d 1037 (9th Cir. 1973) a radio dispatch was received reporting a crime in progress and detailing a description of the perpetrators. The court held that the transmitted information, in the totality of the circumstances, legitimately contributed to probable cause. In *People v. Baer*, 37 AD 2d 150 (3d Dept 1971) the radio information contained a detailed description of the alleged perpetrator and did not merely allege that there was a warrant. See Cases and Points, Appellate Division 37 A.D. 2d Volume 9. Neither these cases, nor *Burton v. New York Central & Hudson Railroad*, 132 N.Y.S. 628, aff'd 210 N.Y. 568 (1911), nor any other case discovered by appellants approves or even intimates the blanket rule that radio bulletins are, by that fact alone, sufficient to validate the actions of responding police officers. See *United States v. King*, 472 F.2d 1 (9th Cir., 1973), cert. den. 414 U.S. 864.

In fact, such a rule would be unconstitutional. The Supreme Court of the United States, in *Whiteley v. Warden*, 401 U.S. 560 (1971), invalidated a search predicated upon a radio report that there was a warrant for the arrest of defendant. The Court stated that the un-

6. Since this information comes through official police channels it has been treated as if coming from a reliable informant; See *United States v. McDowell*, 475 F. 2d 1037 (9th Cir., 1973). Of course this does not answer the question of the sufficiency of the information.

derlying validity of the warrant was the key to its finding. Since the warrant was invalid, broadcasting it did not add to its validity.⁷ The Court specifically rejected the argument that the search was reasonable because the arresting officers had a right to rely upon information sent by another policeman.

We do not, of course, question that the Laramie police were entitled to act on the strength of the radio bulletin. Certainly, police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting an aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest. 401 U.S. at 568.⁸

7. *United States v. Impson*, 482 F.2d 197, 199 (5th Cir. 1973) cert. den. 414 US 1096; *U.S. v. Averett*, 477 F.2d 1009, 1012-1013 (6th Cir. 1973) cert. den. 414 U.S. 851; *U.S. v. Wilson*, 479 F.2d 937, 939 (7th Cir. 1973).

8. Some cases have seized upon the language in the first sentence above to find that a stopping is valid under *Whiteley*, even where an arrest and search are not, e.g. *People v. Dellorjano*, 352 N.Y.S.2d 963, 970 (Co. Ct. Suff. Co. 1974).

These cases misapply *Whiteley*. *Whiteley*, stands for the proposition that information gains no weight by being broadcast. While those who receive such information must act, the ultimate validity of their actions depends entirely upon the nature of the information relied upon to send the message. If that information, when broadcast, could sustain an arrest, then an arrest made in reliance upon it is valid. The same is so for a stop. Here, the People offered no testimony as to the underlying basis of the warrant. *U.S. v. Impson*, *supra* at 199. Moreover, the warrant no longer existed. No action would have been justified by the source of the information and the police at the scene can have no greater right. Any other holding would lead to serious abuse. The police could send a radio report based on nothing and hope that when stopped, the suspect would be found with contraband, etc., in "plain view" or that he might

This is virtually the situation here.⁹ The police were supplied with information that there was a weapons investigation involving Lemmons. That information was incorrect; in fact, there was neither a valid warrant nor any investigation then in progress.¹⁰ As stated in *United States v. Cox*, 475 F.2d 837 (9th Cir., 1973):

Thus in good faith officers can search without a warrant a wrong man incident to a warrantless arrest, yet in good faith officers cannot arrest the right man if the warrant is invalid. 475 F.2d at 840.

See also, *United States ex rel. Mealey v. Delaware*, 352 F. Supp. 349 (D.C. Del., 1972), where the case was remanded to the State Court to determine if there was a valid warrant to justify the search.

do something to justify further action. When the Court in *Whiteley* stated that the Laramie police were entitled to act it removed any stigma from their actions. It did not validate them for Fourth Amendment purposes.

9. *Whiteley* presented a stronger case for upholding the search in two respects. First, the information received by the police officers concerned a crime recently committed; their apprehension of the suspect was analogous to hot pursuit. Second, the dissent observes that the facts, independent of the purported warrant, may have been enough for probable cause. Still, the Court held that a search was not proper. Here, of course, there was neither hot pursuit, nor probable cause.

10. The record of the hearing is unclear as to the precise terms of the information received over the radio. At page A61, Officer Askew testified that "after receipt of an active File 5 that the subject was wanted in connection with an investigation with a police department in Detroit, Michigan," he was placed under arrest. See also, A62. At A81, however, Askew agreed that the radio report concerned a fugitive warrant. See also, A93. No proof was offered as to the existence of a valid warrant at the time of arrest; the burden was on the People to establish such a warrant if this was the asserted basis for the arrest. *People v. Berrios*, 28 N.Y. 2d 361 (1971); *U.S. v. Impson*, supra. Since information about an "investigation" cannot possibly be a stronger predicate for probable cause than information about an outstanding warrant, this brief will treat the radio information, for *Whiteley* purposes, as actually specifying that a warrant existed.

The rationale underlying *Whiteley* was adopted by the Court of Appeals in *People v. Horowitz*:

The question was argued in *People v. Vetrano*, (20 N.Y.2d 698) whether an arrest could be made by the police of the City of White Plains merely on the say so of the Police Department of the City of Yonkers where the crime was committed. The question was not decided, as the memorandum of affirmance shows, inasmuch as it appeared that the account of the attempted robbery in Yonkers was supplied to the Yonkers Police Department by the victim himself.

The controlling principle seems to be that *it is not necessary for the officer making the arrest to know of the reliability of the informer or to be, himself, in possession of information sufficient to constitute probable cause provided that he acts upon the direction of or as a result of communication with a superior or brother officer or another police department provided that the police as a whole were in possession of information sufficient to constitute probable cause to make the arrest.*

This record does not show that any of the law enforcement officers had facts before them sufficient to indicate that this anonymous informer was reliable, or that the police had other information, not derived from the informer, which was sufficient, in itself, to constitute probable cause. 21 N.Y.2d at 60 (1967) (emphasis supplied)

People v. Smith, 31 A.D. 2d 864 (3d Dept., 1969); *United States v. Canieso*, 470 F2d 1224, 1230 ftn. 7 (2d Cir., 1974).

In this case, no law enforcement officer had sufficient

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information to constitute probable cause to arrest or search Lemmons, because no such probable cause existed. Nor did any law enforcement officer have information sufficient to constitute reasonable suspicion to justify a stop.

The Court below erroneously relied upon *People v. La Belle*, 37 A.D.2d 135 (3d Dept., 1971). *La Belle* correctly held that where a warrant is invalid, an arrest may still be proper if the arresting officers have probable cause.

That warrant was invalid, a fact unknown to the arresting officers . . . Nevertheless, the arrest was lawful because made upon probable cause *held by the arresting officers*. *Id* at 137 (emphasis supplied)

Here the warrant was invalid and the arresting officers had no information other than the warrant upon which to rely. If pertinent at all, *La Belle* supports appellants' position.

It is absolutely clear that the arrest of Lemmons was invalid under *Whiteley* and *Horowitz*, and the seizures flowing from it are fruits of the poisonous tree. *Silverthorn Lumber Co. v. United States*, 251 U.S. 385 (1914); *Nardone v. United States*, 308 U.S. 338 (1939). This evidence must be suppressed.

C. The Arrest of Lemmons on the Theory that he was a Fugitive was Invalid.

In *Whiteley v. Warden*, 401 U.S. 560 (1971), the United States Supreme Court stated:

*** the State argues that a reviewing court should employ less stringent standards for reviewing a police officer's assessment of probable cause as a prelude to a warrantless arrest than the court

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would employ in reviewing a magistrate's assessment as a prelude to issuing an arrest or search warrant. That proposition has been consistently rejected by this Court. *United States v. Ventresca*, 380 U.S. at 105-109; *Aguilar v. Texas*, 378 U.S. at 110-111; *Jones v. United States*, 362 U.S. at 270-271. And the reason for its rejection is both fundamental and obvious: less stringent standards for reviewing the officer's discretion in effecting a warrantless arrest and search would discourage resort to the procedures for obtaining a warrant. Thus the standards applicable to the factual basis supporting the officer's probable cause assessment at the time of the challenged arrest and search are at least as stringent as the standard applied with respect to the magistrate's assessment. See *McCray v. Illinois*, 386 U.S. 300, 304-305 (1967)¹¹ (emphasis supplied)

Therefore, those cases dealing with the standards for obtaining a fugitive warrant are applicable here.

The Courts of this state have recognized the requirement of probable cause in such cases. *People v. Artis*, 32 A.D.2d 554 (2d Dept., 1969), involved the requisition by a foreign state of a fugitive detained in New York.

The requisition was founded upon, and accompanied by, two affidavits of a police officer who had investigated the alleged crime, wherein he in substance stated that on May 9, 1966, defendant broke and entered a stated dwelling in the City of Concord, North Carolina, and assaulted an oc-

11. The Supreme Court has gone so far as to suggest that in a close case a search with a warrant may be sustained where without it the search would fail. *Jones v. United States*, 362 U.S. 257, 270. (1960).

cupant with a stick. None of the facts on which these charges were based were stated, there was no indication that such facts were personally known to the deponent or, if made on information and belief, what the sources of the information and the grounds of the belief were. Under well settled law, affidavits such as these, being insufficient to show probable cause, have been held to be inadequate as a basis for a warrant to arrest a person in this State to answer a charge in this jurisdiction (*People v. James*, 4 N.Y. 2d 482, 485; *People ex rel Livingston v. Wyatt*, 186 N.Y. 383, 392). On the other hand, as respects the sufficiency of the papers underlying a warrant of extradition, before *Wolf v. Colorado*, 338 U.S. 25, made the Fourth Amendment applicable to the states through the Fourteenth Amendment and *Mapp v. Ohio*, 367 U.S. 643, made it enforceable against them by the same sanctions and constitutional requirements as prohibit unreasonable searches and seizures by the Federal Government, it was the established rule that the inquiry in the asylum state was limited to whether the accused had been substantially charged with crime in the demanding State (*People ex rel. Higley v. Millspaw*, 281 N.Y. 441 445; *People ex rel. Hayes v. McLaughlin*, 247 N.Y. 238, 242; *Biddinger v. Commissioner of Police*, 245 U.S. 128, 135; *Drew v. Thaw*, 235 U.S. 432, 440). Concededly, by the latter standard the police officer's affidavits herein were a sufficient basis for the issuance of warrant of extradition. However, developments in constitutional law since *Wolf* [*supra*] and *Mapp* [*supra*] have made the requirement of probable cause in "in-state" cases equally applicable to a warrant of arrest in an

extradition case (*Kirkland v. Preston* 385 F. 2d 670; cf. *Giordenello v. United States*, 357 U.S. 480; See *Ker v. California*, 347 U.S. 23, 24; *Beck v. Ohio*, 379 US 89). As appears, the affidavits herein do not meet such test. 32 A.D. 2d at 555.¹²

The Appellate Division by this ruling was not being benevolent to fugitives; the holding simply reflected constitutional mandates. *People ex rel. Miller v. Krueger*, 35 A.D. 2d 743 (2d Dept., 1970); *People ex rel. Porzo v. Wright*, 59 Misc. 2d 1056; (Co. Ct. West. Co. 1969). *People ex rel. Gatto v. District Attorney Richmond Co.*, 32 A.D. 2d 1053 (2d Dept., 1969).

It is necessary, therefore, to read the provisions of the Criminal Procedure Law within the framework of *Whiteley* and *Artis*. Clearly, Section 570.08 contemplates the existence of probable cause as a condition precedent to the issuance of a warrant.¹³ An interpretation of Sections 570.32 and 570.34 at odds with this would render the statutory scheme unconstitutional, since, fundamentally, there can be no arrest of a person on less than probable cause. *United States v. Ventresca*, 380 U.S. at 105-109.

There was, in short, no more cause to arrest Lemmons as a fugitive than there was to arrest him on the underlying weapons charge. Relabeling this arrest cannot make it valid.

¹². Here, of course there were no affidavits at all, nor could there have been.

¹³. The demand for extradition must be accompanied by authenticated copies of an indictment or information or supporting affidavits together with the warrants issued.

D. The Plain View Doctrine Is Inapplicable to this Case.

It is crucial to the resolution of this appeal whether Trooper Askew saw a gun in plain view. Necessary to this finding are two separate determinations: Whether Askew saw anything inside the car before he opened the door and whether what he saw was incriminating. Appellants below had the burden of establishing, by a preponderance of the evidence, that their version of what happened was correct. They sustained that burden.

An accurate evaluation of the conflicts posed by the testimony requires some assessment of the context in which the search occurred. Here, the critical fact which gave color to everything happening thereafter, was the arrest of Lemmons on a weapons warrant. Prior to approaching Lemmons' car, Officer Askew had handcuffed Lemmons and placed him in the patrol car. He returned to the Chevrolet armed with the belief that he had made a valid arrest of a dangerous man; the very nature of the charge against the prisoner supported that belief. As he stated at the hearing, he was going over to Lemmons' car and the three passengers inside to "continue the arrest."¹⁴

Officer Askew gave two different versions of what happened when he reached the passenger window of Lemmons' car. On direct examination, Askew testified that he saw the pocketbook, with a gun inside, through the window, and that he then opened the car door (A63). On cross-examination, however, Askew adopted as true the following answers given during the felony hearing:

Q. When you walked around to the side where

14. A104. The district attorney's memorandum below, at page 2, confirms that this was Officer Askew's intention.

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the passenger was located, you opened the door of the car?

A. Correct.

Q. By opening the door of the car you saw you exposed something to your view, did you not?

A. That's correct.

Q. And what did you say you exposed to your view? How did you describe it? As a purse?

A. Correct. (A110, 134).

Askew then attempted to repair the contradiction by implying that these answers did not exclude the possibility of his having seen the purse initially before opening the door.

Q. And you did not testify before Mr. Justice DuMond that you looked into this car or saw anything in this car prior to opening the door of that car; isn't that a fact?

A. No one asked me, that's correct.

Q. Pardon?

A. No one asked me, that's correct.

Q. That's your contention, that no one asked you that?

A. Correct. (A134-135)

But in fact Askew was asked about any "initial" observations, and he gave a clear, unequivocal answer:

Q. What did you see when you looked in the car before you opened the door?

A. Three heads and three shoulders.

Q. Of people?

A. That's correct.

Q. And that is all?

A. That's all.

Q. That's all you saw other than the usual interior of the car?

A. Correct. (A138-139).

It is apparent that the version of the facts which Askew first recounted at the motion to suppress is an effort to salvage an invalid search.¹⁵

Moreover, this line of testimony bears out the completely reasonable inference that Officer Askew's prime concern as he headed for Lemmons' car was the three occupants still inside. He was certainly aware of the possibility that these persons might be dangerous; he was concerned with his own safety as well as with "continuing the arrest". In this context, the hearing testimony of both defendants that Askew approached with gun drawn is completely credible (B5, C12); so is Hardrick's recollection that Askew told them: "Get out, you're under arrest" (B13). Both of these facts support Askew's original testimony that all he saw before opening the car door was the heads and shoulders of the occupants. Finally, it is obvious that pocketbook, if it was visible at all from outside the car, could only have been seen with a great deal of concentrated peering.¹⁶ Certainly, this experienced police officer, confronted with a situation of possible danger, did not pause to make the nice observations newly asserted at the hearing on the motion to suppress. In some circumstances the sighting of the purse through the car window might have occurred;¹⁷ here, it is apparent that it did not.

15. The district attorney's memorandum of law submitted below, was based upon the testimony at the preliminary hearing and conceded that the guns in the handbag were not seen until after the door was open. Point II of that memorandum is entitled: *THE PROCESS WHEREBY THE OFFICER OPENED THE DOOR OF THE SUBJECT VEHICLE THEREBY ACQUIRING "OPEN VIEW" OF THE .45 CALIBER HANDGUN WAS ENTIRELY LAWFUL* (at page 2, emphasis supplied). Askew's testimony supports no other position. See, T. 258-259 for Askew's testimony before the grand jury to the same effect.

16. The car window was closed, and the pocketbook was at Murphy's feet "close to the passenger door" (minutes of the felony hearing, at 59).

17. In his testimony before the grand jury, Askew testified that the gun was on the seat and not the floor (T. 258-259).

Nor does the improbability end here. In order to apply the plain view doctrine to the finding of the gun, it is necessary to hold that Officer Askew saw the weapon in the pocketbook. This is incredible.

First, it is beyond belief that Murphy would have left her pocketbook open, gun exposed, during the time between the arrest of Lemmons and the approach of Askew. The possibility that a police officer would open the car door and see the weapon was hardly remote; and there was ample time in which to secrete the entire pocketbook, let alone zip it shut. The Appellants Murphy's testimony that, in fact, it was shut during the entire incident (B6) is completely credible.

Second, even if the pocketbook was visible, was actually seen and was unzipped, a gun therein would still not have been "in plain view". This Court specifically found that "this pocketbook when unzipped closes by the nature of the purse itself; it doesn't remain open" (C17). This is flatly contradictory to Askew's assertion that the pocketbook was open and that the gun was visible in the interior.

The clear weight of the evidence supports the testimony of appellants that the pocketbook was closed, that Askew ordered all three occupants out of the car, and that only then did he open the purse and expose the gun inside. Particularly noteworthy is the statement that the two men in the back seat were told to get out first, and that Murphy then followed.¹⁸ Clearly, if a gun had been seen in Murphy's pocketbook, she would have been the first to be removed from the car. Here, it is obvious that Officer Askew was taking precautions proceeding from the arrest of Lemmons and its possible implications. The men were told to get out of the car first because they might

¹⁸ The Chevrolet was a two-door; Murphy had to lean forward while the men in the back emerged.

be dangerous, not because a gun had been seen in Murphy's pocketbook.

Appellants do not challenge the sensibility of the "plain view" doctrine in situations where it truly applies to the facts. But testimony such as that of Officer Askew impairs the viability of this and other recognized principles of law. The ease with which any constitutional rule can be satisfied by skillfully devised testimony mandates that what is unbelievable be disbelieved. However his motivation is viewed, Officer Askew's testimony should not be allowed to sustain the search.

It is well settled, of course, that issues of credibility are primarily for the trial court and its determination is entitled to great weight* (People v. Atlas, 183 App. Div. 595, 600, 170 N.Y.S. 834, 837, aff'd, 230 N.Y. 629, 130 N.E. 921). However, reversal is warranted where the fact findings of the trial court are manifestly erroneous or so plainly unjustified by the evidence that the interests of justice necessitate their nullification (5A C.J.S. Appeal and Error Section 1656 [3]). We refuse to credit testimony which has all appearances of having been patently tailored to nullify constitutional objections. In evaluating testimony we should not discard common sense and common knowledge. This concept is well stated in section 649 of 22 N.Y. Jurisprudence, Evidence, as follows:

"The rule is that testimony which is incredible and unbelievable, that is, impossible of belief because it is manifestly untrue, physically impossible, contrary to experience, or self-contradictory, is to be disregarded as being without evidentiary value, even though it is not con-

tradicted by other testimony or evidence introduced in the case." *People v. Garafolo*, 44 A.D.2d 86 at 88. (2d Dept. 1974)

See also, *People v. McCormick*, 39 A.D.2d 590 (2d Dept. 1972).

POINT II

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTION OF LEMMONS, HARDRICH AND ALLEN

The only evidence in this case pertaining to the charge for which defendants Lemmons, Hardrich and Allen were convicted was that two guns were found in defendant Murphy's pocketbook. This pocketbook was found on the floor of the car near where Murphy had been sitting.

Under these circumstances, the conviction of Lemmons, Hardrich and Allen for possession of these weapons cannot stand.

First, under the very terms of the statute Section 265.16 P.L., no presumption can arise where the weapon is found on the person of a particular party. Here, the possession of the guns can only be attributed by Murphy. These weapons were found in her pocketbook. A woman's pocketbook is clearly on her person and numerous cases have, in analogous circumstances, so held. For example, in *People v. Pugach*, 15 N.Y. 2d 65 (1964), cert. denied 380 U.S. 936, the Court of Appeals upheld the "frisk" of defendant's brief case even after it had been taken from defendant and was in possession of a police officer. The Court stated:

The fact that the loaded gun was found concealed in the brief case, rather than in a pocket of defendant's clothing, affords no grounds for saying

that this "frisk" was in reality a constitutionally protected search. The loaded firearm concealed in the brief case carried in the hands of the defendant was in the language of the statute "concealed upon his person" (Penal Law Section 1897). *Id.* at 69¹⁹

People v. Moore, 32 N.Y.2d 67, 71 (1973) ("frisk" of defendant's handbag permitted). See *People v. Bowles*, 29 A.D. 2d 996 (3d Dept., 1968) ("frisk" of defendant's trousers which were on the floor of defendant's room).

It is clear, that contraband contained in the handbag of one of the passengers of an automobile is contraband "concealed upon the person" of that occupant and that occupant alone. The mere fact that at the time of the discovery and seizure Murphy was not physically holding her bag is not significant.

In *Pugach*, the discovery was made after the police had custody of the brief case. In *Moore*, the same is so of the handbag. In *Bowles*, the same is true of the trousers. *People v. Davis*, 52 Misc. 2d 184, 185 (Sup. Ct., Queens Co. 1966); *People v. Desthers*, 343 N.Y.2d 887 (Crim. Ct., City of N.Y., N.Y. Co. 1973); *People v. Garcia*, 41 A.D.2d 560 (2d Dept. 1973); *People v. Rivera*, N.Y.L.J. 9/18/74 p. 17 Col. 6 (Special Narcotics Court, N.Y.C., 1974).

Moreover, Murphy was the only woman in the automobile and the pocketbook was seen between her leg and the door immediately prior to the seizure.

Under those circumstances the presumption set out in

19. It should be noted that Section 1897 is the predecessor to Section 265 P.L.

Section 265.15 cannot arise as to Lemmons, Hardrich and Allen.

Second, if the presumption is applicable here, then it is unconstitutional as applied.

In *Leary v. United States*, 395 U.S. 6 (1969), the Supreme Court held that a presumption must be regarded as "irrational" or "arbitrary", and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proven fact upon which it is made to depend. *Id* at 36.

The New York test has been held to conform to that set out in *Leary*; though the actual language is somewhat different (i.e. "based on life and life's experiences", there is a "fair", "natural" and "rational" connection between the fact proved and the fact to be presumed or inferred). *People v. McCaleb*, N.Y.2d 394, 400-401 (1969); *People v. Terra*, 303 N.Y. 332, 335 (1951) app. dism'd 342 U.S. 938; *People v. Reisman*, 29 N.Y.2d 278, 286 (1971).

Assuming that the presumption is constitutional on its face, *People v. De Leon*, 32 N.Y.2d 944 (1973), it is clearly unconstitutional as applied. There can be no "substantial assurance" that a defendant in a car is more likely than not to know what is on the person of other occupants of the car²⁰ *State v. Lewis*, 225 A.D. 2d 582, 584 (Superior Ct., of New Jersey, App. Div., 1966). In the practice commentary to Section 220.25 (dealing with possession of drugs in an automobile) Messrs. Denzer and McQuillan state:

While thus broadening the automobile presumption in one respect, the revised section narrows it in another with the logical limitation that it does not apply where "the drug is concealed

²⁰ Even though, technically, the possession of those in the car are "contents" of the car.

upon the person of one of the occupants" (cf. former Penal Law Section 1751 (4)). *In that situation, no sound basis exists for presuming possession by any of the other occupants;* yet in the absence of the indicated proviso, the former provision was rigidly construed as not allowing of any exception in such cases (*People v. Potter*, 1956, 4 Misc. 2d 796, 162 N.Y.S. 2d 439). Apart from the inherent injustice of that proposition, it was inconsistent with a similar provision of the former Penal Law dealing with weapons found in automobiles, which expressly excluded such cases from the scope of the presumption (Section 1899 (3a) (Emphasis supplied).

See, also, Revised Penal Law Section 265.15 (3a).

Without resort to the presumption, the evidence is totally insufficient to sustain the conviction. *People v. Di Landri*, 250 App. Div. 52 (1st Dept., 1937)

It cannot be held with any degree of certainty that the revolver which was found on the floor of the car belonged to the defendant or was in his constructive possession rather than in the possession of one of the other occupants of the car. The defendant's guilt, therefore, was not established beyond a reasonable doubt. *Id* at 52.

People ex re. De Feo v. Warden of City Prison, 136 Misc. 836 (Sup. Ct., Kings Co., 1930) (and cases cited therein); *People v. Rivera*, N.Y.L.J. 9/18/74 p. 17 col. 6 (Spec. Narc. Ct., NY Co., 1974).

In fact, the statutory presumption was enacted in 1936 to meet this difficulty. *People v. Rogan*, 94 N.Y.S. 2d 681, 683 (Sup. Ct., Kings Co., 1949).

Or as the Appellate Division, First Department stated:

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Before enactment of Section 1898-a of the Penal Law (now superseded by Penal Law, Sections 1899, 1900) ²¹, mere presence in an automobile of a pistol and several persons was insufficient to establish constructive possession of the pistol by any of the persons. *People v. Anthony*, 21 A.D. 2d 666 (1st Dept., 1964).

In conclusion, it is apparent that the statutory presumption set out in Section 265.15 cannot apply to Lemmons, Allen or Hardrich. This is so both statutorily and constitutionally. Without this presumption there can be no legal conviction of Lemmons, Hardrich or Allen. Even if there had been evidence outside the presumption to sustain the conviction, ²² the conviction still cannot be sustained. The Court charged the jury on the presumption and Lemmons, Hardrich and Allen are entitled, at the very least, to a new trial.

POINT III

THE COURT'S CHARGE ON REASONABLE DOUBT REQUIRES A NEW TRIAL

In its charge to the Jury on the definition of "reasonable doubt" the Court stated:

That simply means that if a Jury entertains a doubt as to the guilt of defendant, it *must* be such a doubt for which *the juror* *must* give a *reasonable explanation* if he were requested to do so. (T736) (emphasis supplied)

This charge was improper. The Court defined reasonable doubt in terms of the ability of a juror to articulate the basis of that doubt.

²¹. Now superseded by Section 265.15 P.L.

²². An example of this would be if Appellants' fingerprints had been found on these guns. The presumption would not apply but there would still be evidence of possession.

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A juror may very well hold a reasonable doubt a. 1 yet not be able to express himself clearly or cogently if required to do so. To define reasonable doubt in this fashion is to create a standard which varies depending on the debating abilities of jurors. This is not permissible²³ and a new trial is required.

CONCLUSION

**THE JUDGMENT OF CONVICTION SHOULD
BE REVERSED AND THE INDICTMENT
DISMISSED OR IN THE ALTERNATIVE
APPELLANTS SHOULD BE GRANTED A NEW
TRIAL.**

Respectfully submitted,

GOLDBERGER, FELDMAN & BREITBART
Attorneys for Defendants-Appellants

23. *Contra, People v. Ales*, 220 App. Div. 743 (2d Dept., 1927); Dowsey *Charges to the Jury and Requests to Charge in a Criminal Case in New York*, Part I, Form #11 p. 3-10 (1968).

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

EILEEN SHAPIRO , being duly sworn, deposes and
says that She is AN Assistant in the office of the Attorney
General of the State of New York, attorney for Appellants
herein. On the 25 day of July , 1977 , she served
the annexed upon the following named person :

Michael Young, Esq.
Goldberger, Feldman & Breitbart
401 Broadway
New York, New York 10013

Attorney in the within entitled proceeding by depositing
a true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by the
Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by him for that
purpose.

Sworn to before me this
25 day of July , 1977

Carl Sale
Assistant Attorney General
of the State of New York

Eileen Shapiro